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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DWIGHT COLEMAN, *et al.*,
Petitioners

v.

CLAYTON YEUTTER, SECRETARY
OF AGRICULTURE, *et al.*,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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85 pp

QUESTION PRESENTED

Whether Congress intended the Farmers Home Administration (FmHA) provisions of the Agricultural Credit Act of 1987 to deprive farmers whose loan accounts were accelerated, and whose farm production income needed for the payment of essential family living and farm operating expenses was taken by FmHA through notices and procedures that were declared unconstitutional, of their claims to deacceleration, reinstatement and restitution of releases of farm production income.

PARTIES TO THE PROCEEDING

In addition to the party named in the caption, other named Petitioners are Lester Crowsheart, Sharon Crowsheart, Russell Folmer, Anna Mae Folmer, George Hatfield, June Hatfield, Donna McCabe, Diane McCabe, Gary A. Barrett, Rosemary K. Barrett, Richard L. Harmon, Betty J. Harmon, Larry L. Robertson, Nancy K. Robertson, Ross Wade, and Maureen Wade, on behalf themselves and others similarly situated.

These named petitioners represent themselves and a national class of farmers described as: "all persons who have obtained a farmer program loan from the Farmers Home Administration, and who are or may be eligible to obtain a farmer program loan from the Farmers Home Administration, and whose loans are or will be administered in the Farmers Home Administration offices located throughout the United States, but the national class does not include: (a) borrowers who reside in states where a statewide class action is requested (and not denied at a later time), or is already certified; or (b) borrowers who have presently filed actions that directly relate to the implementation of 7 U.S.C. § 1981a, the constitutionality of a prehearing cut-off of necessary family living and farm operating expenses, and the constitutionality of the Farmers Home Administration appeal procedure." *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983). The class consists of over 200,000 farmers.

In addition to the party named in the caption, other Respondents are Neal Sox Johnson, Acting Administrator of the Farmers Home Administration; Ralph W. Leet, State Director of the Farmers Home Administration for North Dakota; various district directors of the Farmers Home Administration; and various county supervisors of the Farmers Home Administration.

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Dwight Coleman, *et al.*, and the class of farmers they represent respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 28, 1988.

OPINIONS BELOW

The opinion of the court of appeals of which review is sought (App. A, 1a) is reported at 864 F.2d 604 (8th Cir. 1988). That ruling held that the appeal and cross-appeal in this action were moot due to the passage of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, and ordered that the May 7, 1987 (App. C, 19a) and June 2, 1987 (App. D, 26a) orders of the district court be vacated. The court also ordered that the farmers' complaint be dismissed. The district court orders are reported at 663

F. Supp. 1315 (D.N.D. 1987). The court of appeals' February 1, 1989 order (App. B, p. 18a) denying rehearing is unreported.

JURISDICTION

The opinion of the court of appeals was entered on December 28, 1988 (App. A, p. 1a). The petition for rehearing was denied on February 1, 1989 (App. B, p. 18a). On April 17, 1989, Justice Blackmun entered an order extending Petitioners' time to file this petition to and including June 30, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1361, and 1337.

STATUTORY PROVISION INVOLVED

Appendix J sets out relevant provisions of the Agricultural Credit Act of 1987, Pub. L. No. 100-233. A relevant provision of the Food Security Act of 1985, Pub. L. No. 99-198 is in Appendix I.

STATEMENT OF THE CASE

A writ of certiorari is requested in this case so that this Court can review whether the court of appeals' decision that the FmHA provisions of the Agricultural Credit Act of 1987 (hereafter referred to as the "Credit Act") provide exclusive remedies for all petitioner class members for the unconstitutional actions of the Farmers Home Administration (FmHA). The court of appeals' decision that the Credit Act provides exclusive remedies for the claims in this case means that Congress intended the Credit Act to do the following things:

> (1) Take away the farmers' rights under the district court order to bring individual actions against FmHA for harm from loan accelerations resulting from FmHA's unconstitutional notice and procedures;

(2) Take away the farmers' rights and opportunity to seek, through further litigation of this action, broader relief in the form of group-wide deacceleration of unlawfully accelerated loan accounts or, in the alternative, a notice to the affected class members of the right to bring individual actions for such relief; and

(3) Take away the farmers' opportunity to seek, through individual actions or the appeal in this case, restitution of any of the nearly $2 billion of farm income unlawfully taken by FmHA.

There is nothing in the Credit Act itself or in the legislative history that suggests that Congress had any intention of depriving the very farmers it sought to protect through the passage of the Act of these rights and remedies.

The following is a summary of the lengthy history of this case, which includes several court decisions. Also discussed are two related statutes passed during the life of this case.

Petitioners commenced this action in the spring of 1983 against the Secretary of Agriculture and officials of FmHA. Petitioners filed this action on behalf of over 200,000 family farmers across the nation.[1] The action challenged FmHA's

1 The case was originally filed on behalf of FmHA farmer loan program borrowers in the state of North Dakota. However, in late 1983, the district court, at the request of Petitioners, certified a national class consisting of "all persons who have obtained a farmer program loan from the Farmers Home Administration, and who are or may be eligible to obtain a farmer program loan from the Farmers Home Administration, and whose loans are or will be administered in the Farmers Home Administration offices located throughout the United States, but the national class does not include: (a) borrowers who reside in states where a statewide class action is requested (and not denied at a later time), or is already certified; or (b) borrowers who have presently filed actions that directly relate to the implementation of 7 U.S.C. § 1981a, the constitutionality of a prehearing cut-off of necessary family living and farm operating expenses, and the constitutionality of the Farmers Home Administration appeal procedure." *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983).

procedure for foreclosing and liquidating loans made to family farmers. It also challenged FmHA's procedure of collection on loans through seizure of farmers' crop and livestock production income that the farmers needed to pay essential family living and farm operating expenses.

On November 14, 1983, the district court issued a preliminary injunction that became a permanent injunction on February 17, 1984. *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983); *Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984) (App. pp. 29a-36a). This injunction prohibited FmHA from taking any acceleration, foreclosure, liquidation, or other collection action against family farmers until it provided them with (1) a notice of its intent to take such action; (2) a notice of the availability of and the opportunity to apply for the loan deferral program; and (3) an opportunity to appeal the agency's decision to take the adverse action and any adverse decisions on deferral.

These orders also required FmHA to continue to release its security interest in the farmer's income from the sale of his/her crop and livestock production that the farmer needed to pay essential family living and farm operating expenses until the above-stated notice and hearing procedures were followed. These orders, thus, established that FmHA farm program borrowers were entitled to releases of crop and livestock production income for payment of essential family living and farm operating expenses up until the point of acceleration of their loan accounts. The court based this part of its opinion on FmHA regulations then in place, 7 C.F.R. § 1962.17 (1983). This regulation provided in part that if it is found that the amount of income originally planned for the year will not be received, FmHA shall release its security interest in such income to make payments in the following order of priority:

> 1. Pay necessary farm, home and other expenses planned for payment by cash as incurred;

2. Prorate repayments on credit advanced for necessary farm, home and other operating expenses to FmHA and other creditors; and

3. Make planned payments on other debts.

Coleman v. Block, 580 F. Supp. 194, 199 (D.N.D. 1984) (App. pp. 29a-30a.)

On November 1, 1985, FmHA issued regulations by which it intended to implement the loan deferral program authorized by Congress in 1978 and which provided for the notice and hearing procedures required by the district court's orders. 50 Fed. Reg. 45740-803 (Nov. 1, 1985).

On December 23, 1985, the Food Security Act of 1985 was enacted, incorporating the principle of the district court's orders that FmHA release a security interest in farmers' crop and livestock production income for payment of essential family living and farm operating expenses up until the point the farmers' loan accounts are accelerated. Pub. L. No. 99-198, § 315, 99 Stat. 1354, 1528 (1985).

In January 1986, the district court granted the farmers permission to file a Supplement Class Action Complaint challenging the notices and procedures established by the November 1, 1985 FmHA regulations.

On May 7, 1987, after FmHA had issued the challenged notices to approximately 78,000 farmers and accelerated the loans of 13,000 among them, the district court entered an order declaring that the challenged notice procedures violated the farmers' constitutional right to due process of law and ordered FmHA to revise them. (App. pp. 19a-25a.)

On June 2, 1987, the district court issued an injunction against FmHA. The district court's June 2, 1987 order provided appropriate injunctive relief to two categories of the petitioner class members. (App. pp. 26a-28a.)

(1) *Group #1.* FmHA was enjoined from accelerating loan accounts of class members who had received the defective notices but whose accounts had not been accelerated prior to May 7, 1987, without first providing these farmers with a set of corrected notice forms and making available the services provided for in those corrected forms.

(2) *Group #2.* FmHA was required to reverse any acceleration of a class member's loan accounts that was made on or between May 7, 1987 and June 2, 1987, and to treat such class members as if they were in Group #1 described above.

However, the district court did not provide sufficient relief to ensure that the government did not take property from one group of farmers through the use of the constitutionally-defective notice forms. With regard to this third group of class members—those 13,000 farmers whose loans had proceeded to acceleration between November 1, 1985 and May 7, 1987 pursuant to the unlawful notices—the court granted only partial, temporary relief. As to this group, FmHA was enjoined from proceeding further with foreclosure or execution on any loan accelerated before May 7, 1987, until 30 days after the court determined that the corrected forms required by the court's May 7, 1987 order are available in the FmHA county offices.

In the same order, however, the court specifically allowed FmHA to continue to take from these farmers their farm production income needed for payment of essential family living and farm operating expenses, even though such takings were a result of accelerations that occurred as a consequence of the use of the unconstitutional notice forms. *Coleman v. Lyng,* 663 F. Supp. 1315 (D.N.D. 1987) (App. pp. 26a-28a.) The district court also allowed FmHA to continue to take through administrative offset farm program payments owed to farmers by the USDA Agricultural Stabilization and Conservation Service, even though FmHA held no security interest in such

payments. According to FmHA regulations, such offsets could occur only after accelerations.

Although the court declined to deaccelerate the loans of all borrowers in this group of approximately 13,000 class members—the relief sought by the plaintiffs—the court did hold that these borrowers had the right to bring individual actions against FmHA if they were harmed by the taking of farm production income or the government farm program payments. *Coleman v. Lyng*, 663 F. Supp. 1315 (D.N.D. 1987) (App. pp. 27a-28a).

The Respondents appealed from the May 7 and June 2, 1987 district court decisions. The Petitioners cross-appealed, requesting the additional relief of loan deacceleration for the 13,000 borrowers whose accounts were illegally accelerated through the use of the unconstitutional notice forms and procedures. Such deacceleration relief that would have resulted in reinstatement of the statutory requirement that FmHA release its security interest in all farm production income needed for payment of essential living and farm operating expenses. The farmers in this group also sought restitution of farm proceeds improperly taken by the government pursuant to the unlawful acceleration. In the alternative, the farmers sought an order of the court directing that written notice of the court's decision be sent to the 13,000 farmers in this group, advising them of their right to bring individual actions for harm caused by the unlawful accelerations. The court denied all requested additional relief for this group.

In an attempt to ensure that the approximately 13,000 farmers whose FmHA loan accounts were accelerated through the unconstitutional notice procedures would be able to maintain their families and farming operations until they could apply and be considered for a new FmHA debt restructuring program, Congress passed § 611 of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988) (App. pp. 49a-51a). The new debt restructuring program, authorized for the first time by the Credit Act, required that

FmHA consider principal and interest write-off if it would collect as much through such restructuring of the farmer's existing debt as it would through foreclosure and liquidation of the collateral for the loans. Credit Act, § 615 (App. pp. 51a-55a).

The Agricultural Credit Act of 1987 also provided specific requirements for the content of the notices that were to be sent to all borrowers who were 180 days or more delinquent, prior to acceleration, liquidation, foreclosure, or other collection action being taken on their loans. Credit Act, § 605 (App. pp. 48a-49a). The statutory specifications for these notices were substantially consistent with the district court's May 7, 1987 order requiring correction of the notice forms.

The Credit Act also prohibited foreclosure actions until all debt restructuring and loan servicing options under the Credit Act were offered to the borrower. Credit Act, § 615 (App. pp. 54a-55a).

The Agricultural Credit Act of 1987 was enacted on January 6, 1988. On December 28, 1988, the court of appeals dismissed Respondents' appeal and Petitioners' cross-appeal on the grounds that the Credit Act made them moot and ordered the district court to dismiss the complaint and vacate its orders. Even though the Credit Act did not grant all remedies sought by petitioners, the court of appeals held that "Congress's obvious intent was that the 1987 Act would function as a legislative enactment of the remedy for the grievances presented in this court." (App. p. 14a.) Once the court of appeals concluded that Congress intended to provide exclusive remedies in this case, it held that Congress amended the farmers' entitlement to releases of their production income and that such amendment should be applied retroactively. (App. pp. 14a-17a.)

REASONS FOR GRANTING THE PETITION

This case presents an important question of law—whether the FmHA provisions of the Agricultural Credit Act of 1987 deprive farmers whose loan accounts were unlawfully accelerated the opportunity to obtain deacceleration, reinstatement of their farm income releases, and restitution of the property taken by FmHA in violation of the farmers' right to due process of law. This case, thus, involves the interpretation of one of the most far-reaching pieces of agricultural credit legislation in the last century, legislation which was designed to further encourage and sustain the family-farm system of agriculture in this country.

Virtually all borrowers affected by these legislative provisions are members of the class. Thus, this is a case of first, and possibly last, impression in which the interpretation of these legislative provisions will be considered.

According to a declaration of Glenn J. Hertzler, Assistant Administrator, Farmers Programs, of FmHA, based on the average farmer's need for releases for payment of essential family living and farm operating expenses, approximately $969 million a year would be involved if FmHA were required to deaccelerate the unlawfully accelerated accounts and reinstate such releases. (App. K.) This is a potential $969 million dollars of the farmers' own income that would be infused into their rural economies as payments to local farm suppliers and creditors and for state and local property taxes. Thus, nearly $2 billion of these farmers' income is at stake in this case.

Subsumed within the issue of the proper application of the income relief provisions of the Credit Act is the issue of whether the court of appeals correctly applied the rules of statutory construction when it implied that Congress intended to affirm FmHA's ability to take farmers' property despite Congress's acknowledgement that such taking occurred as a result of unconstitutional notice procedures.

The practical impact of a ruling such as the court of appeals' in this action is to discourage the public from seeking assistance from the legislative branch to resolve long-standing and costly legal disputes with their government. If a litigant does so, and Congress provides only partial relief as it did here, the appeals court ruling places the entire matter in litigation at complete risk. Such a consequence should follow only upon clear, unmistakable legislative language and congressional intent. Neither is present in this case.

A principal canon of statutory construction is that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, the language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm. v. GTE Sylvania,* 447 U.S. 102, 108 (1980). When a court finds that the language of the statute is unambiguous, judicial inquiry is complete. *Rubin v. United States,* 449 U.S. 424 (1987). The language of the Credit Act, standing along, does not clearly answer the question of whether the Act provides an exclusive remedy to farmers whose production income was taken as a result of illegal loan acceleration resulting from the use of the constitutionally-defective notice forms and procedures.

The court of appeals acknowledged that the plain language of the Credit Act did not answer this question when it went beyond the language of the Credit Act to consider the legislative history. However, when the court of appeals turned to the legislative history to find congressional intent, it failed to properly apply well-established canons of statutory construction. These canons are:

> (1) "That statutory language cannot be construed in a vacuum.... That words of the statute must be read in their context and with a view to their placement in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury,* ___ U.S. ___, 109 S. Ct. 1500, 1505 (1989), citing *United States v. Morton,* 467 U.S. 822, 828 (1984); and

> (2) "That Congress intends to retain those remedies that it has left in place." *Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd.*, 394 U.S. 404, 412 (1969).

In interpreting the relevant provisions of the Credit Act, the court of appeals failed to appropriately consider the context in which the Credit Act was passed, as well as the overall statutory scheme.

The FmHA provisions of the Credit Act amended the Consolidated Farm and Rural Development Act (CFRDA), which is the legislation authorizing the agency to make loans to family farmers. When reviewing the CFRDA scheme, it reveals:

> A unique mixture of social welfare legislation and legislation carefully designed to supplement the business needs of the high credit risk farmer.

Curry v. Block, 541 F. Supp. 506, 513 (D. Ga. 1982).

The FmHA farmer loan programs are the principal vehicle by which Congress intends the United States Department of Agriculture to meet its congressional objective of fostering and encouraging family farms.

> Congress reaffirms a historical policy of the United States to foster and encourage the family farm system of agriculture in this country. Congress believes that the maintenance of the family farm system of agriculture is essential to the social well being of the nation and the competitive production of adequate supplies of food and fiber.... It is the policy and the express intent of Congress that no such [agricultural] program be administered in a manner that will place the family farm at an unclear economic disadvantage.

7 U.S.C.A. § 2266(a) (West 1988).

Congress expressly stated that, in carrying out the provisions of the CFRDA, "the Secretary of Agriculture should ensure that ... a priority is placed on keeping existing farm operations operating." Pub. L. No. 95-332, Title I, § 126, 92 Stat. 428 (1978).

This continued commitment to the preservation of the family farm system of agriculture was expressed by Congress in enacting the Agricultural Credit Act of 1987. Again, that legislation emphasized the national commitment to preserving family farms.

> This title applies the advantages of a loan restructuring program to the Department of Agriculture's Farmers Home Administration (FmHA). This will allow the Department to convert a lot of its nonperforming loans into paying assets. At the same time low-income farmers will be given a second chance—benefitting their rural communities and their families.

S. REP. No. 100-230, Nov. 20 (legislative day, Nov. 19), 1987, p. 5. (App. p. 37a.)

> It also begins to make the Farmers Home Administration (FmHA) more responsive to the financial crisis in agriculture ... distressed ... FmHA borrowers, who often through no fault of their own, are now facing foreclosure, will be given a second chance in cases where restructuring loans is less costly than foreclosure.

Id. at 21. (App. p. 40a.)

The structure and context of the Credit Act itself was also overlooked by the court of appeals in its interpretation and analysis of the sections of the Credit Act at issue here. In passing the Credit Act, Congress not only acknowledged the district court's ruling that the FmHA foreclosure and liquidation notice procedures were unconstitutional, but also codified specific

notice requirements intended to remedy those defects. Credit Act, § 605. (App. pp. 48a-49a.)

Congress also added teeth to the requirement that FmHA take all actions possible to keep existing farming operations operating by authorizing a new debt restructuring program which mandated that the agency consider principal and interest write-off of debt to keep existing family farmers in business, if the government would collect as much through such restructuring as through foreclosure and liquidation of the collateral for those loans. *See* Credit Act, § 615 (App. pp. 51a-55a).

In this process, Congress clearly recognized that the accelerated group of FmHA farm program borrowers who were still involved in ongoing litigation seeking deacceleration of their loan accounts would not in the meantime be able to take advantage of the new debt restructuring program if these farmers were denied any use of farm proceeds or farm program payment income to pay expenses essential to maintaining their families and farm operations. The restructuring program established by Congress is a lengthy one, taking up to six months just for the initial administrative determination. Congress also allowed FmHA a six-month rule-making period.

To assist these families and to give them a "second chance," Congress passed a provision granting them production income releases—limited, however, to up to $18,000—for payment of essential living and operating expenses for the 12 months it expected it would take FmHA to implement the program and consider them for debt restructuring.[2] The language in § 611 of the Credit Act itself indicates that the production income release provision was intended to act as a new right to releases to keep these family farms operating during the time it took to

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2 If FmHA did not make a final decision on a request for debt restructuring from a borrower with accelerated loans within 12 months, releases of farm income would continue in proportion to the length of time after 12 months until a final decision is made. Credit Act, § 611 (App. pp. 49a-51a).

consider them for debt restructuring. It says nothing about substituting this new right for the legal claims that the farmers continue to litigate in this case.

The relevant release provisions of the Credit Act state:

> (3) A borrower whose account was accelerated on or after November 1, 1985, and on or before May 7, 1987, but not thereafter foreclosed on or liquidated, shall be entitled to the release of security income for a period of 12 months, to pay the essential household and farm operating expenses of such borrower in an amount not to exceed $18,000 over 12 months, if such borrower—
>
> (A) as of October 30, 1987, continued to be actively engaged in the farming operations for which the Secretary had made the farmer program loan; and
>
> (B) as of the deadline for responding to the notice provided for under paragraph (5), requests restructuring of such loans pursuant to section 353.
>
> ....
>
> (5)(A) Within 45 days after the date of the enactment of this subsection, the Secretary shall provide to the borrowers described in paragraph (3) notice by certified mail of the right of such borrowers to apply for the benefits under such paragraph.
>
> (B) Releases under such paragraph shall be made to qualified borrowers who have responded to the notice within 30 days after receipt.
>
> (C) *Within 12 months after a borrower has requested restructuring under section 353, the Secretary shall make a final determination on the request. Notwithstanding the 12-month limitation provided for in paragraph (3), releases shall continue to be made to the borrower until a denial or dismissal*

> *of the application of the borrower for restructuring under section 353 is made. The amount of essential household and farm operating expenses which may be released to any borrower eligible for such releases after 12 months may exceed $18,000, by an amount proportionate to the period of time beyond 12 months before a final determination is made by the Secretary.*

Credit Act, § 611 (emphasis added) (App. pp. 49a-51a).

The legislative history taken in the context of the whole statutory scheme does not support the court of appeals' position that Congress intended the Credit Act to provide exclusive remedies for the issues in this action. Quite to the contrary, it supports the position that Congress accepted the lower court's decisions that FmHA illegally accelerated some borrowers' accounts and was treating them unfairly, and that Congress wanted to improve their situations and to ensure that they were given a second chance through application for the debt restructuring program. There is no indication in the legislative history that Congress intended to end the court case, to deprive these farmers of their individual claims to deacceleration which they had under the existing court decisions, or to preclude their efforts to broaden that relief through their pending appeal. All indications were that Congress intended to affirm and support the rulings of the lower court.

The following quote from the legislative history clearly demonstrates that, in passing the Credit Act, Congress intended to acknowledge and support the court's decision in this case.

> A majority of the Committee Members felt strongly that any agricultural credit package reported this year should contain reform of the Farmers Home Administration. These Members were decidedly frustrated with the Farmers Home Administration's intransigence in dealing with the problem loans in a sensitive and compassionate manner commensurate with its role as the Federal

> Government's lender of last resort. During the last several years, federal courts have frequently overridden FmHA and virtually mandated many of FmHA's policies and management actions. The Committee would have much preferred the agency's adherence to the compassionate spirit of the law and the agency's long tradition of helping needy borrowers.

H.R. REP. No. 100-295 (I) (Aug. 28, 1987), p. 71. (App. p. 46a.)

At the senate mark-up session in which the release provisions of the Credit Act were developed, Senator Boren, the chairman of the subcommittee, in discussing the time limit for the additional releases, states:

> Certainly we would not want to stretch it more than in the two years because you have got this court case and you have got the restructuring plan that we put in place in the bill ... [T]hey will be thrown back into the restructuring pool, will they not, these that are under the court case?

TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES SENATE, SUBCOMMITTEE ON AGRICULTURAL CREDIT OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, MARK-UP OF FARM CREDIT ACT AMENDMENTS OF 1987 (Oct. 30, 1987), p. 74. (App. p. 44a.)

Senator Conrad, a strong supporter and sponsor of the FmHA provisions of the Credit Act, stated at the same mark-up session:

> If we do not buy some time for these people to have a chance to restructure, they are liquidated. They are just wiped out.... If you do not give them the release of operating expenses even though those operations would cash flow if they are restructured, you have consigned them to the junk heap, and they do not necessarily need to be there.

Id. at pp. 77-78. (App. p. 45a.)

Congress intended that the $18,000 release provisions act as a new right—a stop-gap measure—to protect these farmers during the debt restructuring consideration, not as an exclusive remedy for their claims to deacceleration. This is also supported by language in the Senate Report on the Credit Act:

> This section specifically addresses one of the classes of plaintiffs in the *Coleman* case mentioned earlier. This class consists of around 14,000 borrowers whose FmHA accounts were accelerated but who received a notice which did not properly advise them of their rights. This title requires the Secretary to begin making income releases, upon the request of the borrower, of up to $18,000 per year, for those borrowers who are actively engaged in farming. *It also requires FmHA to continue to release income until the FmHA has made a final determination of the borrower's application for debt restructuring.*
>
> ....
>
> These income releases will benefit rural communities as a whole by ensuring that farmers can pay their local suppliers and businesses and local property taxes. This section will also benefit the Farm Credit System and local banks by allowing farmers whose production income is controlled by FmHA to pay on their first mortgages to the Farm Credit System institutions.
>
> It will allow the 14,000 borrowers whose accounts have already been accelerated by FmHA the opportunity to have their loans restructured. Eventually, with restructuring many of these borrowers will be able to continue farming. *But these borrowers will not be able to keep their farms in operation, or their families fed and clothed, if their releases are terminated during the months FmHA*

> *takes to issue regulations and consider them for such restructuring.*

S. REP. NO. 100-230, Nov. 20 (legislative day, Nov. 19), 1987, p. 40. (emphasis added) (App. pp. 41a-42a.)

Again, nothing in this language suggests that Congress intended to substitute this remedial scheme for the remedies still being sought in court by the farmers.

Congress did indicate that, by enacting specific statutory requirements, it intended to resolve for the future the issues raised in this action regarding the content of the notice forms sent to farmers prior to acceleration and foreclosure. However, it said nothing about substituting those notices, or the stop-gap income releases, for that which had already occurred, and which was the subject of ongoing litigation in the appeals court.

> In a series of opinions and orders, the United States District Court in North Dakota has ordered FmHA to provide improved notices to FmHA borrowers that explain their options and clearly inform them of their rights. These decision include *Coleman v. Block,* 580 F. Supp. (D.N.D. 1984); *Coleman v. Lyng,* Civ. A1-83-47, Memorandum and Order (D.N.D. May 7, 1987); *Coleman v. Lyng,* Civ. A1-83-47, Memorandum and Order (D.N.D. June 2, 197). The committee intends that the FmHA notices required by Title VI of S. 1665 be easy to read, informative, and helpful to FmHA borrowers, and that they clearly set forth servicing options in a timely and constructive manner. This title of S. 1665 is based on careful analysis of the *Coleman* opinions and is designed to address, for the future, the notice issues raised in that case.

S. REP. NO. 100-230, Nov. 20 (legislative day, Nov. 19), 1987, p. 38. (App. p. 41a.)

This language applies only to the content of the notices, not to the remedy for previous deprivations of income and farm program payments through the illegal accelerations resulting from such notices.

By failing to appropriately consider the overall statutory scheme and context of the CFRDA and the Agricultural Credit Act of 1987, the appeals court failed to recognize that Congress's intent was that the Credit Act confirm the federal government's commitment to fostering family farms by giving farmers who suffered from the financial crisis of the 1980s and the illegal actions of FmHA a "second chance" to preserve their farms. Indeed, the court of appeals went on to hold that the legislative history implied that Congress intended to deprive 13,000 farmers of remedies that they had gained through this action—the right to bring individual actions for deacceleration of their accounts that were accelerated through the use of unconstitutional forms.

The court of appeals cited portions of legislative history out of context, and without consideration of the structure of the Credit Act, to find by implication that Congress intended to provide exclusive remedies for the issues raised in this case and, by doing so, deprive the very farmers whom Congress intended to assist of the remedies they had acquired through the court decisions, which were expressly supported by Congress. In finding this implied intent of Congress to provide exclusive remedies, the court has effectively found, by implication, that Congress intended to affirm a governmental taking of farmers' property through actions Congress knew to be unconstitutional. Such congressional affirmation of unconstitutional actions should be of such a serious nature that it should not be implied but, rather, required to be expressly stated in the legislative history.

The court of appeals ignored another well-established principle of statutory construction—that in interpreting remedial legislation the "legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect." *Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd.*, 394 U.S. 404, 412 (1969).

Section 611 of the Credit Act, which provides for $18,000 worth of releases over the course of 12 months, during which borrowers with accelerated loan accounts would have their debt restructuring applications considered, is a granting of a new right. Never before had borrowers with accelerated loans been entitled to *any* release of farm proceeds to pay living and operating expenses. The fact that Congress granted this new right to these 13,000 borrowers did not mean that Congress precluded these borrowers' nonstatutory right to pursue their individual actions against FmHA for harm resulting from their illegal accelerations. There is nothing in the legislative history that could be used as the clear language necessary to find that Congress intended to preclude such individual actions for relief.

The legislative history does not demonstrate that Congress intended the Credit Act to provide exclusive remedies for FmHA's unconstitutional actions being litigated in this case. The law at the time the court of appeals ruled, thus, was not that which the court of appeals applied. Rather, the law at the time the court of appeals ruled provided farmers whose accounts were unlawfully accelerated with a new right to release of their farm income in order to give them the opportunity to apply for the new debt restructuring program. The law did not amend these farmers' past entitlement to release of their farm income until a lawful acceleration occurred. Nor was it intended to deprive them of the relief already granted by the district court—the right to bring individual actions against FmHA for harm caused by the unlawful acceleration or to pursue further relief in this case through the appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-5477 and 88-5003ND

DWIGHT COLEMAN, *et al.*,
Appellees/
Cross-Appellants,

v.

RICHARD E. LYNG, *et al.*,
Appellants/
Cross-Appellees

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Submitted: September 19, 1988
Filed: December 28, 1988

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and ARNOLD, Circuit Judge.

ARNOLD, Circuit Judge.

In this case, a nationwide class of borrowers from the Farmers Home Administration (FmHA) challenged the validity of certain FmHA loan servicing policies on statutory and constitutional grounds. The District Court dismissed all but one of the farmers' fourteen claims for relief, and awarded partial relief to members of certain subgroups of the plaintiff class on the remaining claim. Both sides appeal. After the entry of the District Court's order, Congress enacted the Agricultural Credit Act of 1987, P.L. No. 100-233, 101 Stat. 1568, a statute which provides more relief to the plaintiffs than the remedy ordered by the District Court. We hold that the passage of the Agricultural Credit Act moots both the government's appeal and the farmers' cross-appeal. Accordingly, we vacate the judgment of the District Court and remand with instructions to dismiss.

I.

This litigation began in March 1983, when several North Dakota farmers filed suit on behalf of a state-wide class of FmHA borrowers challenging the FmHA's farm loan liquidation and foreclosure procedures. The complaint alleged that these procedures failed to include provisions for loan deferral as mandated by 7 U.S.C. § 1981a, and violated the plaintiff's Fifth Amendment right to due process. The District Court subsequently certified the class and granted preliminary relief. *Coleman v. Block*, 562 F. Supp. 1353 (D.N.D. 1983). The Court later granted the plaintiffs' motion to expand the class to a nationwide class, *Coleman v. Block*, 100 F.R.D. 705 (D.N.D. 1983), and extended the preliminary relief to the nationwide class. *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983). Following a three-day trial on the merits, the District Court issued a permanent injunction prohibiting FmHA from accelerating borrowers' loans, foreclosing on borrowers' collateral property, or liquidating the living and operating allowance from sale proceeds of crops and livestock offered as collateral for FmHA loans, unless the FmHA provided 30 days' written notice of the action with reasons for the action, a right to an appeal, and an opportunity to establish eligibility for loan

deferral under 7 U.S.C. § 1981a. *Coleman v. Block*, 580 F. Supp. 194, 210-11 (D.N.D. 1984).

This appeal concerns the validity of the FmHA's response to the District Court's 1983-84 orders. After the District Court granted the preliminary injunction, the FmHA prepared a set of documents known as the "pretermination package" for use in taking adverse action against borrowers. The pretermination package replaced the previous set of forms (which the District Court had found defective) as of November 14, 1983, and remained in use until October 19, 1984. At that time, the FmHA introduced still another set of forms, designated as forms FmHA 1924-14, 1924-25, and 1924-26,[1] which superseded the pretermination package. These three documents, sent to delinquent FmHA borrowers in advance of loan acceleration, reflected new regulations governing FmHA loan servicing published on November 30, 1984 at 49 Fed. Reg. 47,007 and promulgated in final form on November 1, 1985 at 50 Fed. Reg. 45,740.

On November 29, 1985, the plaintiffs filed a supplemental complaint[2] which raised fourteen claims for relief, challenging both the pretermination package and the superseding 1924 series of FmHA forms under the Administrative Procedure Act, 5 U.S.C. §§ 551-706, and the Due Process Clause. Ten of these claims have been resolved or dismissed by the District Court

1 These forms bore the following captions: Form FmHA 1924-25, "Notice of Intent to take Adverse Action"; Form FmHA 1924-26, "Borrower Acknowledgement of Notice of Intent to Take Adverse Action"; Form FmHA 1924-14, "Notice—Farmer Program Borrower Servicing Options Including Deferrals and Borrower Responsibilities." Each form is reproduced in an appendix to the District Court's opinion, *Coleman v. Block*, 663 F. Supp. 1315, 1334-38 (D.N.D. 1987).

2 The original supplemental complaint was amended with leave of the Court, and the final form of the pleading for purposes of this appeal is the First Amended Supplemental Class Action Complaint, filed on February 3, 1986.

without appeal.[3] Three of them have lost practical significance.[4] Only the tenth claim for relief, and the scope of the remedy ordered for this claim, are at issue in this appeal.

II.

The tenth claim for relief alleges that forms FmHA 1924-14, 1924-25, and especially 1924-26 deprive FmHA borrowers of property without due process of law. (The property right involved, according to plaintiffs' theory, is the right, created by statute, to be considered for various alternatives to foreclosure.) These documents are the first materials the FmHA sends to borrowers who are behind in their loan repayments, and whose loans may be accelerated. Form FmHA 1924-25, "Notice of Intent to Take Adverse Action," informs the borrower that his

3 The District Court dismissed claims one through five, eight, nine, and eleven with prejudice, *Coleman v. Block*, 663 F. Supp. 1315, 1333 (D.N.D. 1987), and the plaintiffs have not appealed. Claim six was apparently settled before trial. *Id.* at 1319-20. Claim seven involved a procedural error in the publication of an FmHA regulation which was apparently remedied before the close of the District Court proceedings. *Id.* at 1333.

4 Claims twelve through fourteen involve farmers whose loans had been accelerated after they received the preterminaton package. The District Court dismissed these claims on the basis of laches, holding that the plaintiffs had unreasonably delayed filing their challenge to the use of the preterminaton package. *Id.* at 1328-29. The plaintiffs did appeal the District Court's application of laches to these three claims, and briefed the issue as part of their cross-appeal. At oral argument, however, plaintiffs' counsel conceded that almost all borrowers whose loans were accelerated through use of the preterminaton package had already lost title to the property which secured their loans. The District Court denied relief for that subclass of borrowers who had already lost title to their property, *id.* at 1341-42, and the plaintiffs do not appeal this aspect of the District Court's order. As a result, virtually all of the farmers who might have been entitled to relief on claims twelve through fourteen are now beyond any meaningful opportunity for relief, as the plaintiffs themselves concede. If any farmers whose loans were accelerated by use of the preterminaton package still retain title to their property, their position and claims for relief for purposes of this appeal will be identical to those of the second group of farmers, discussed *infra* at 8

or her account is delinquent, or that the borrower has otherwise violated the FmHA loan agreement. Form 1924-25 notifies the borrower of the opportunity to appeal the intended adverse action, and indicates the availability of servicing options provided by statute. Form FmHA 1924-14 describes these options, which include various types of loan deferral, and refinancing. The borrower has thirty days after receipt of this notice to complete Form FmHA 1924-26, "Borrower Acknowledgement of Notice to Take Adverse Action." Form FmHA 1924-26 requires the borrower to choose one of four possible courses in response to the intended adverse action:

> (1) The borrower may apply for one or more of the seven loan servicing actions listed in Form 1924-25;
>
> (2) The borrower may appeal the intended adverse action to an FmHA hearing officer;
>
> (3) The borrower may elect to cure the default by paying the delinquent account or making restitution for any unauthorized disposition of security; or
>
> (4) The borrower may elect to liquidate the account by selling or transferring the secured assets.

These three FmHA forms are the first step in a process that often culminates in the foreclosure of the mortgage on the farmer's land, and the liquidation of all crops, livestock, and equipment which have secured the defaulted FmHA loan.

The farmers' tenth claim for relief incorporates several grievances concerning the clarity and completeness of the 1924 series of forms. The farmers allege that these forms are unreadable, and that they misrepresent or fail to mention important features of loan servicing options under § 1981a. In effect, the farmers argue, the FmHA forms deprived borrowers of their statutory rights throughout the foreclosure and acceleration process. The District Court rejected the farmers'

criticisms of the wording and thoroughness of the notice forms, observing that the improvements that the farmers sought would only make the forms longer and more difficult to understand. See *Coleman v. Block*, 663 F. Supp. 1315, 1331-32 (D.N.D. 1987). The Court found that the FmHA's general scheme, in which the forms would provide borrowers with general notice of their options and direct them to the county FmHA offices for a more thorough explanation, was "a constitutionally permissible, and even preferable, alternative." *Id.* at 1332.

The District Court found, however, that this system of notice, though sound in principle, failed in practice because county FmHA agents were unprepared to provide the information borrowers requested. According to the plaintiff's uncontradicted evidence, county agents for the FmHA provided "inadequate or misleading information, or no information at all" to borrowers seeking further explanation of their options listed in the 1924 series of forms. *Id.* at 1332. The District Court concluded that the inability of the county FmHA agencies to explain the available alternatives to loan acceleration under § 1981a constituted a denial of notice and a violation of the farmers' rights to due process. *Id.* at 1332-33.

The District Court also found an arbitrary deprivation of a protected property right in one element of Form FmHA 1924-26. That form directs delinquent borrowers to choose one, and only one, of four available liquidation options, in spite of the fact that a single Notice of Adverse Action may be used to cover more than one kind of loan. The District Court reasoned that FmHA borrowers are entitled to make a separate election of liquidation options for each loan and each reason for the proposed adverse action, and concluded that Form 1924-26 deprived borrowers of this entitlement to a mix of options by limiting them to a single choice. *Id.* at 1333. As a remedy for these asserted constitutional deficiencies, the District Court ordered the FmHA to amend Form 1924-26 by including a prominent statement that explanations of the various options available to borrowers would be available at county FmHA offices. The FmHA was further required to

prepare a comprehensive packet of information explaining the requirements, terms, restrictions, and benefits of each option for dissemination to county FmHA agents. Finally, the District Court ordered the FmHA "to amend form FmHA 1924-26 to allow borrowers a separate election of options for each loan accelerated and for each reason given for each proposed action." *Id.*

In this order, which was entered on May 7, 1987, the District Court declined to grant any relief to borrowers whose loans had already been accelerated through the use of form 192426. The Court reconsidered this decision in a supplemental order of June 2, 1987, in which it concluded that at least some borrowers already affected were entitled to have their loan accelerations reversed. The Court divided the plaintiff class into three groups for purposes of relief. Farmers who had received the faulty notice forms, but whose loans had not yet been accelerated as of the date of the Court's May 7th order, constituted the first group. The Court enjoined the FmHA from accelerating the loans of any farmer in this group without first providing a corrected set of forms and the information services at county FmHA offices required by the May 7th order. For any farmer whose loan had been accelerated between May 7, 1987 and the date of the supplemental order, the Court ordered the FmHA to reverse the acceleration and extend the same relief available to other farmers in the first group. *Id.* at 1342. The Court noted that this group included about 65,000 FmHA borrowers. *Id.* at 1340.

The second group, numbering about 13,000 borrowers, consisted of farmers receiving the deficient forms whose loans had already been accelerated prior to the May 7, 1987 order, but who still held title to their collateral property. The Court concluded that "[t]he price of a blanket reversal of acceleration is too high to pay" for this group, *Id.* at 1342, and so limited the remedy for these farmers to an injunction preventing the FmHA from proceeding with any foreclosure on collateral property until thirty days after the corrected notice forms and explanations became available in county FmHA offices.

According to the Court, this remedy would enable borrowers to learn whether they had actually been denied beneficial options by the operation of Form 1924-26, and if so, to pursue individual actions for recovery. *Id.* The Court specifically denied the plaintiffs' request for reversal of these farmers' loan accelerations, restoration of releases of security for farm operating and living expenses, and prohibition of confiscation of payments under other government programs to offset indebtedness to the FmHA. *Id.*

The third group, numbering about 1,000 borrowers, consisted of farmers who had received the deficient forms and had already lost title to their collateral property. The Court concluded that for this group "[t]he inequitable results of [retroactive] relief would ... outweigh the benefits," and decided not to "reopen the wounds of those individuals for whom the legal process has been completed." *Id.* at 1341. While it noted that these farmers were free to seek any actual damages resulting from the defective FmHA notice in their local courts, the Court denied any relief to the third group for purposes of this class action.

III.

The FmHA appeals, contending that Form 1924-26 does not deprive borrowers of property without due process. The FmHA argues that Form 1924-26 does not affect any private right protected by the Fifth Amendment, and that even if it does, the form does not deprive borrowers of any such rights without due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The farmers cross-appeal, arguing that the District Court failed to provide enough relief to the second group of borrowers (those farmers whose loans had already been accelerated, but who had not yet lost title to their property). According to the farmers, an appropriate remedy for the second group would have (1) enjoined the FmHA from any future seizure of farm-production income or government payments which would have been released for living and operating expenses prior to

acceleration, and (2) ordered the FmHA to provide these farmers with timely notice that new information on servicing options was available at county FmHA offices. The farmers claim that the unconstitutional deprivation which borrowers in the second group sustained cannot be adequately remedied by the limited relief granted below, and so they urge us to reverse the District Court's denial of a broader remedy as an abuse of discretion.

IV.

During the pendency of this appeal, the Agricultural Credit Act of 1987, Pub. L. No. 100-233, 101 Stat. 1568 (1988), was signed into law. Title VI of the Act, §§ 601-626, titled "Farmers Home Administration Loans," makes extensive changes in the statutory provisions which form the background for this litigation. The Senate Committee report on Title VI of the Act specifically explains that "[t]hese provisions are intended to carry out the intent of the *Coleman* decisions in the context of this reform of FmHA practices." S. Rep. No. 100-230, 100th Cong., 1st Sess. 6 (1987).

The Act requires the Secretary of Agriculture to

> provide notice by certified mail to each borrower who is at least 180 days delinquent in the payment of principal or interest on a loan made or insured under this title.

P.L. No. 100-233, § 605 (adding § 331D(a) to Subtitle D of the Consolidated Farm and Rural Development Act (CFRDA), 7 U.S.C. § 1981 *et seq.*). This notice must

> (1) include a summary of all primary loan service programs, preservation loan service programs, and appeal procedures, including the eligibility criteria, and terms and conditions of such programs and procedures;
>
> (2) include a summary of the manner in which the borrower may apply, and be considered, for all

such programs, except that the Secretary shall not require the borrower to select among such programs or waive any right in order to be considered for any program carried out by the Secretary;

(3) advise the borrower regarding all filing requirements and any deadlines that must be met for requesting loan servicing;

(4) provide any relevant forms, including applicable response forms;

(5) advise the borrower that a copy of regulations is available on request; and

(6) be designed to be readable and understandable by the borrower.

P.L. No. 100-233, § 605 (adding § 331D(b) to Subtitle D of the CFRDA). The Act further requires that this notice shall be provided:

(1) at the time an application is made for participation in a loan service program;

(2) on written request of the borrower; and

(3) before the earliest of —

(A) initiating any liquidation;

(B) requesting the conveyance of security property;

(C) accelerating the loan;

(D) repossessing property;

(E) foreclosing on property; or

(F) taking any other collection action.

P.L. No. 100-233, § 605 (adding § 331D(d) to Subtitle D of the CFRDA). Furthermore, the Act prohibits the Secretary from "initiat[ing] any acceleration, foreclosure, or liquidation in connection with any delinquent farmer program loan before the date the Secretary has issued final regulations to carry out the amendments made by this section." P.L. No. 100-233, § 615(d).

The Act also provides benefits for farmers whose loans had been accelerated between the introduction of Form 1924-26 and the May 7th, 1987 injunction of the District Court. Like all other borrowers who are over 180 days delinquent in their loan repayment, these farmers are entitled to the Notice of Loan Service Programs required by new § 331D(a) (added by § 605 of the Act). The Act also makes a special provision for the release of income derived from sales of secured crops and chattels for farmers whose loans had been accelerated between November 1, 1985 and May 7, 1987. Any borrower in the District Court's second group

> whose account was accelerated on or after November 1, 1985, and on or before May 7, 1987, but not thereafter foreclosed on or liquidated, shall be entitled to the release of security income for a period of 12 months, to pay the essential household and farm operating expenses of such borrower in an amount not to exceed $18,000 over 12 months

as long as the borrower is still farming and requests restructuring of the debt. P.L. No. 100-233, § 611 (adding § 335(f)(3) to Subtitle D of the CFRDA).

V.

The FmHA tacitly concedes that the Agricultural Credit Act renders its appeal moot. Congress has now required the FmHA to do everything the District Court ordered on constitutional grounds. Under the new § 331D(b) of the CFRDA (added by § 605 of the 1987 Act), each borrower threatened with adverse action must receive a readable summary description of all available loan servicing programs. Section 331D(b) also provides that "the Secretary shall not require the borrower to select among such programs or waive any right in order to be considered for any [FmHA] program," a provision which duplicates the District Court's order that Form 1924-26 be amended to allow a separate election of options. The Act further directs the Secretary to suspend all acceleration, liquidation,

and foreclosure until the new notice requirements created by the Act are carried out, a provision which has the same effect as the District Court's June 2nd injunction. Even if the FmHA were to prevail on all issues on its appeal, the 1987 Act would still impose the same obligations ordered by the District Court. The FmHA's appeal is therefore moot.

The farmers' cross-appeal presents a more difficult problem. For the first group of borrowers (whose loans had not yet been accelerated as of May 7, 1987), the Act mandates as much relief as the plaintiffs claim.[5] For the second group of borrowers whose loans had already been accelerated before May 7, 1987, but who still retain title to their property, the Act mandates more relief than the District Court actually ordered, but less than the plaintiffs claim they were entitled to receive. The Act entitles these borrowers to adequate notice of loan servicing options, an opportunity to reprocess their applications for loan servicing, and a moratorium on foreclosure actions until final regulations are in place—a remedy which exceeds that ordered by the District Court, *compare* 663 F. Supp. at 1342. In addition, § 611 of the Act provides for the release of up to $18,000 of security income over twelve months to pay the essential household and farm operating expenses of borrowers in the second group. This last provision of the Act grants accelerated borrowers the release of security income which the District

5 The farmers' only argument against declaring the first group's claims moot is that, by vacating the District Court's orders, this Court would be denying the farmers the chance to challenge the FmHA's new notice forms to ensure compliance with the May 7, 1987 injunction. This concern is unwarranted. The farmers can always challenge any shortcomings in the FmHA's new regulations and notice forms by filing a new lawsuit. The terms of the May 7, 1987 injunction would no longer be important in such a proceeding, since Title VI of the 1987 Act would provide a more extensive and more concrete basis for any claim for relief on these grounds. Of course, future litigants are also free to pursue constitutional challenges similar to those raised in this case. However, the possibility that FmHA acceleration procedures may be challenged on constitutional grounds at some point in the future does not justify burdening the District Court with perpetual jurisdiction over a controversy that is currently moot.

Court declined to order, but the Act's imposition of a one-year, $18,000 limit significantly restricts this relief.

As a result, the farmers argue that a live controversy remains in this case even after the passage of the Act. Their complaint alleges that

> [a]ny liquidation, acceleration, foreclosure, denial of income, appeal waiver or other adverse action initiated by or resulting from the [FmHA 1924 series of forms] will deny to plaintiffs and class members due process of law guaranteed them under the Fifth Amendment to the United States Constitution.

First Amended Supplemental Class Action Complaint, Tenth Claim for Relief, § 113. According to the farmers, any denial of security-income release that resulted from a loan acceleration in which Form FmHA 1924-26 was used was an unconstitutional deprivation of property. For any borrower, the security income released might well have exceeded $18,000 per year, and lasted more than twelve months.[6] The farmers conclude that they are entitled to a remedy for the FmHA's unconstitutional deprivation which exceeds the limited relief granted by the Act. The farmers therefore urge us to consider their cross-appeal on the merits, and to reverse the District Court's denial of retroactive relief.

The farmers proceed on the incorrect assumption that Congress intended its reform of FmHA practices to operate

6 The operating years in which this security income would have been needed are now past. The farmers claim, however, that the denial of income releases forced them to take other measures, like incurring further indebtedness, in order to pay expenses. The farmers argue that these effects of past denials are still capable of remedy by means of income release beyond the limits imposed by the new Act.

separately from the federal courts' adjudication of claims arising during the period preceding the Act. The legislative history of the Act repeatedly confirms that Title VI of the Act "... is based on careful analysis of the *Coleman* opinions and is designed to address, for the future, the notice issues raised in that case." S. Rep. No. 100-230, 100th Cong., 1st Sess. 38. In particular, the Senate Committee report on the bill makes it absolutely clear that the income release provisions of § 611 constitute an additional form of relief for the borrowers in the second group before the District Court:

> Title VI also provides certain farmers with "income releases".... Farmers who remain on the farm, whose FmHA loans were [accelerated] between November 1, 1985 and May 7, 1987 (farmers affected by the *Coleman v. Lyng* court decisions), shall be entitled to 12 months of income release for household and operating expenses (not in excess of $18,000 per year per borrower) if the borrower timely applies for loan restructuring.

Id. at 5-6. The report stresses that

> [t]hese [income release] provisions are intended to carry out the intent of the *Coleman* decisions in the context of this reform of FmHA practices.

Id. at 6. Congress's obvious intent was that the 1987 Act would function as a legislative enactment of the remedy for the grievances presented in this case.

We lack the power to add to or subtract from the remedy enacted by Congress. This is true, not because Congress can determine how particular cases before the courts are decided, but because the actual source of any relief in this case is necessarily the statutory provision for agricultural credit which

Congress amended in the 1987 Act. Congress is free to alter such a system of entitlements during the pendency of a case, and when it does so, the reviewing court must "apply the law as it is now, not as it stood below." *Kremens v. Bartley,* 431 U.S. 119, 129 (1977).

As the law stands now, borrowers whose loans were accelerated before May 7, 1987 are entitled to no more than $18,000 of income release over twelve months. If the farmers are correct on the merits of their cross-appeal, these borrowers might have been entitled to a greater amount under the law as it existed when the District Court ruled. Congress, however, can change the statutory rights of litigants, even where this change may retroactively eliminate an initially meritorious claim, except where the new statute itself is for some reason unconstitutional. Congress may, for example, retroactively change the formula for allocating federal highway funds, and this change in law may effectively moot a lawsuit brought under prior law governing that year's allocation of funds. See *State of Arkansas v. Goldschmidt,* 627 F.2d 839 (8th Cir. 1980) (per curiam). Congress may retroactively amend the Fair Labor Standards Act to exempt state and local governments from liability under the Act for six months prior to the amendment's passage, even though this retroactive change extinguishes a claim brought under the FLSA before the passage of the amendment. See *Austin v. City of Bisbee,* 855 F.2d 1429 (9th Cir. 1988). Congress's intent to resolve this dispute by changing the law is at least as clear as it was in *Goldschmidt* and *Austin*. We conclude that the 1987 Act's retroactive effect precludes the farmers' chance for greater relief on their cross-appeal.

It is true that the District Court decided this case on the basis of the Due Process Clause, a provision which is beyond the reach of Congress's legislative power. However, the alleged property right which the farmers sought to vindicate against unconstitutional deprivation is itself entirely a creation of

statute. "Property interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source [of law] that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). In particular, it is only a statute that entitles an FmHA borrower to a release of income from the sale of secured crops: Nothing in the Constitution itself guarantees farmers such a security income release. Although plaintiffs might obtain injunctive relief ordering the provision of statutory benefits denied without due process, courts have no further remedial power when Congress validly amends the statute authorizing benefits.[7] See, *e.g., Jones v. Reagan,* 748 F.2d 1331, 1338-39 (9th Cir. 1984), *cert. denied,* 472 U.S. 1029 (1985).

As a result, the farmers cannot make out a constitutional claim that survives the passage of the 1987 Act, unless they can show that the 1987 Act is itself unconstitutional by, *e.g.,* retroactively depriving them of their income-release rights without due process. The farmers have not attempted to make such an argument. The retroactive application of the 1987 Act to the farmers' income-release claims is justified by the need to allocate FmHA resources fairly, and this is definitely the kind of "rational legislative purpose" which passes the constitutional test for retroactive legislation. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 730 (1984).

7 This principle applies even if we cast the farmers' cross-appeal as a claim for money damages against FmHA officials on the constitutional-tort theory of *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971). Where Congress creates a remedial scheme to address the administration of federal benefit programs, the Courts will not authorize the creation of a *Bivens* remedy, unless Congress was unaware that its action might affect constitutional claims, which is certainly not the case here. See *Schweiker v. Chilicky,* 108 S. Ct. 2460, 2468 (1988).

In the aftermath of the Agricultural Credit Act of 1987, the parties' appeals from the District Court's orders no longer present a live case or controversy for adjudication. The orders and judgment of the District Court are vacated, and the case is remanded to that Court with directions to dismiss the complaint as moot.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-5477 and 88-5003ND

DWIGHT COLEMAN, *et al.*,
Appellees/
Cross-Appellants,

v.

RICHARD E. LYNG, *et al.*,
Appellants/
Cross-Appellees

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Petition for rehearing of appellees/cross-appellants has been considered by the Court and is denied.

February 1, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-83-47

DWIGHT COLEMAN, *et al.*,
Plaintiffs
v.
RICHARD E. LYNG, *et al.*,
Defendants

[Filed May 7, 1987]

EXCERPTS FROM
MEMORANDUM AND ORDER

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* * *

In their tenth claim for relief, plaintiffs assert that forms FmHA 1924-14, 1924-25, and 1924-26 do not meet the due process requirement of the fifth amendment. Copies of these three forms are attached to this order as an appendix. Notice of the impending governmental deprivation and the opportunity for a hearing on the deprivation is an essential element of due process. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). The timing and content of the notice depends on the competing interests involved in a particular case. *Id.* The notice given must inform interested parties of the hearing available to them, and

enable them to adequately prepare for it. *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 14 (1978). The form and content of the notice "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315 (1950).

Two countervailing factors must be considered in tailoring the due process notice to the circumstances of the present case. First, FmHA borrowers have available to them a number of provisions or programs intended to help see them through the crises involving their loans. These options are bewildering both in number and complexity. Second, it has been asserted without contradiction that some seventy percent of FmHA borrowers have a twelfth grade education or less. Any notice will have to strike a reasonable balance between providing complete notice of the options available and ensuring that the notice given can be read and understood by its intended recipients.

Generally, the three FmHA forms embody a reasonable compromise of these two competing goals. Plaintiffs, however, have raised numerous objections to the forms. These objections will not be individually reviewed. The various assertions that the forms are in violation of this court's permanent injunction in this case do not address their constitutionality. The proper vehicle for these allegations would be a motion to have defendants held in contempt. This court neither encourages nor discourages the bringing of such a motion.

The various assertions that passages of the forms are difficult to comprehend have some merit, but this court is satisfied that the difficulty does not rise to the level of a constitutional violation. On the other hand, the "improvements" plaintiffs assert are constitutionally essential would greatly detract from the comprehensibility of the forms. For example, form FmHA 1924-14 is criticized in part as follows:

It fails to adequately describe the 1981a deferral in that it does not clearly state that both principal and interest payments

may be deferred, nor does it state that the interest accruing during the deferral period will not be capitalized. This description does not give the borrower an indication of how the agency has construed the statutory criteria. The description does not provide the borrower with any indication of the types of circumstances FmHA will consider to be beyond the borrower's control, nor how long a temporary inability to pay can last, nor how living standards are to be determined. The form also fails to provide the borrower with notice of any of the various non-statutory conditions of deferral eligibility the agency has imposed by regulation. Form 1924-14 also fails to adequately describe the criteria for eligibility for the other loan servicing options available, nor does it describe how the borrowers' terms or rates of interest may change with rescheduling and reamortization. It does not describe how long a loan can be rescheduled or reamortized and does not describe how interest rates can be reduced through these actions.

This passage contains only some of the many additions proposed by plaintiffs. If these proposals were adopted, the result would be a booklet of intimidating length and technical detail, which would not likely be read, and even less likely understood, by many members of the plaintiff class. This court finds that the scheme of defendants, in which borrowers are given general notice of what kinds of options are available and directed to contact their county office with questions concerning them, is a constitutionally permissible, and even preferable, alternative. This court notes that FmHA incorporated many of the changes suggested in the comment submitted by the Center for Rural Affairs in its final versions of the forms.

Plaintiffs have, however, identified several constitutional infirmities in the notice given by the forms. The three forms are sent together. FmHA 1924-25 notifies the borrower of the default and the impending adverse action, and directs the borrowers attention to various aspects of FmHA 1924-26. FmHA 1924-26 presents the borrower with a series of choices

of which, if any, loan servicing options the borrower wishes to make use of. The form must be completed and returned within thirty days. FmHA 1924-14 provides further brief descriptions of the loan servicing options listed on FmHA 1924-26, and of some of the responsibilities of the borrower. It also states that the borrower can obtain additional information from the FmHA county supervisor. Forms FmHA 1924-14 and 1924-25 are notice forms, but FmHA 1924-26 is both a notice form and something more. Because the choices made by the borrower on this form are binding, the act to foreclose other options, this form is actually the first step in the application of the adverse action. The completion of, or the failure to complete, FmHA 1924-26 can be the decisive act in the liquidation process. Because of the potential impact of this form, and particularly because of the number and complexity of the options available, the notice given borrowers must be both clear and comprehensive. The weak link in the present notice system is the reference of borrowers to the county offices for further information.

Plaintiffs have submitted uncontradicted evidence that borrowers who seek additional information from county FmHA offices pursuant to the statement on FmHA 1924-26 receive inadequate or misleading information, or no information at all. They assert that FmHA has taken no substantial steps to ensure that FmHA county agents have current, uniform, comprehensive information with which to respond to requests for information. Further, it is possible that many borrowers will not read to the bottom of FmHA 1924-26, which is an only slightly helpful document.

Form FmHA 1924-26 must have added to it the statement, prominently displayed, that complete explanations of the various options listed on the form, and the implications or effects of choosing or rejecting them, are available at the local county FmHA office. FmHA must formulate and distribute to all of its county offices uniform and comprehensive, but also clear and readable, explanations of each of the options listed

on FmHA 1924-26, including, but not necessarily limited to, the eligibility requirements, terms, restrictions, and benefits of each option, and the effect that choosing one option would have in foreclosing the availability of other options. These explanations will aid FmHA personnel in responding to borrowers' requests for information. These explanations must also be promptly provided to borrowers upon request, in lieu of or in addition to any oral explanation, at the option of the borrower. Each explanation must be clearly labelled to identify which option on FmHA 1924-26 it applies to. Complete sets of the explanations, serving in sum as a comprehensive guide to the completion of FmHA 1924-26, must be promptly provided to borrowers upon request. By way of example, the relevant explanations would include the availability of the various types of "debt settlement."

The combination of the concise information presented in the three forms mailed to the borrowers with the comprehensive supplementary information available upon request will provide due process notice well tailored to the unique circumstances of this case.

Plaintiffs have also identified a flaw in the mechanics of FmHA 1924-26. The form orders borrowers to choose options from any one, but only one, of four categories. A single FmHA 1924-26 form, however, can cover more than one loan, or more than one basis for adverse action on a single loan. As a result a borrower who, for example, is having a loan accelerated because of a default on the payments due and also because of an improper disposition of security, would confront a dilemma. The borrower would not be allowed to apply for loan servicing to cure the default and to also make restitution to cure the improper disposition. Defendants must redraft FmHA 1924-26 to allow borrowers to make a separate election of options for each loan accelerated and for each reason given for each proposed adverse action. Providing a separate form for each loan or basis for adverse action would be one possible solution.

The above flaw in FmHA 1924-26 is not an instance of insufficient notice. It is instead a denial of due process in the form of an arbitrary deprivation of a protected property right. FmHA 1924-26 operates, in some circumstances, to deprive borrowers of protected interests without the opportunity for a hearing on the merits. The due process clause requires fundamental fairness in the operation of proceedings to deprive citizens of protected interests. *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 24 (1981) *reh. den.* 453 U.S. 927. The effect of FmHA 1924-26 is fundamentally unfair, and so the form must be altered to provide all borrowers with the full process due them.

Therefore IT IS ORDERED:

Plaintiffs' claims for relief numbers one, two, three, four, five, six, eight, nine, eleven, twelve, thirteen, and fourteen are hereby dismissed with prejudice to the bringing of another action for the same cause or causes.

Plaintiffs' seventh claim for relief is hereby dismissed with prejudice to the bringing of another action for the same cause or causes, except that it is not dismissed so far as it challenges the adoption of 7 C.F.R. § 1951.44(b)(5) for failure by FmHA to include with the publication of the rule a concise general statement of the basis and purpose of the rule.

Defendants are hereby ordered to submit to this court within thirty days of the filing of this order a concise general statement of the true basis and purpose of 7 C.F.R. § 1951.44(b)(5) as contemplated at the time the rule was promulgated.

Defendants are hereby ordered to amend form FmHA 1924-26 by adding to it, prominently displayed, a statement that explanations of the various options listed on the form, and the effect of choosing one of them, are available at the county FmHA office.

Defendants are hereby ordered to file with this court, and deliver to counsel for plaintiffs, within thirty days after the entry

of this order, comprehensive, but also clear and readable, explanations of each of the options listed on FmHA 1924-26, including, but not necessarily limited to, the eligibility requirements, terms, restrictions, and benefits of each option, and the effect that choosing that option would have in foreclosing the availability of other options. Plaintiffs will have twenty days from the date of the filing of the explanations to file with this court, and deliver to counsel for defendants, any suggestions regarding the content of the explanations.

Defendants are hereby ordered to amend form FmHA 1924-26 to allow borrowers to make a separate election of options for each loan accelerated and for each reason given for each proposed action.

Dated this 7 day of May, 1987, at Bismarck, North Dakota.

/s/Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-83-47

DWIGHT COLEMAN, *et al.*,
Plaintiffs
v.
RICHARD E. LYNG, *et al.*,
Defendants

[Filed June 2, 1987]

EXCERPTS FROM
MEMORANDUM AND ORDER

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* * *

For the second group, by contrast, the tipping of the scales is a finer matter. These borrowers have suffered the effects of having their living and operating releases terminated, and in some cases, of having their other government payments confiscated. This court, however, cannot know how many of these borrowers have suffered actual damages as a result of the constitutional flaws in the notice process. Some of the borrowers may have been fully informed of the various options open to them despite the flaws. Some may not have been adversely affected by the binding choices required by FmHA Form 1924-26. Some may have been in such serious financial

difficulty that no available program could keep them on the farm. The number of borrowers in the second group who would not have been accelerated had the notice process not been flawed is not known.

Against this weighty but uncertain interest must be balanced the heavy financial cost and disruption of activity that reversing the acceleration of these borrower's loans would inflict on FmHA, and the resulting impairment of its ability to serve the members of the class. It is also possible that at this stage of the adverse action process there are borrowers who would prefer not to have this court return them to square one.

This court concludes that the remedy for the borrowers in this group must be tailored to assist the individuals actually harmed by the unconstitutional aspects of the notice of intent to take adverse action. The price of a blanket reversal of acceleration is too high to pay when we sweep those who have not been actually harmed along with those who have. Accordingly, this court will enter an order enjoining FmHA from foreclosing on the loans of the borrowers in the second group. This injunction will terminate thirty (30) days after this court determines that the corrected notice forms and explanations of options mandated by the May 7 order are available in all FmHA offices. This injunction will not require FmHA to reverse the acceleration of the loans of the members of the second group, or to restore security releases or refrain from confiscating government payments. It will maintain the status quo of May 7, 1987, until the accelerated borrowers can make a determination of whether to proceed with their own actions against FmHA. This will allow those borrowers who did not in fact learn of the options available to them that might have benefitted them, or who had a potentially beneficial option denied to them by the binding nature of the defective form 1924-26 election, and who would not have otherwise been accelerated, to recover for that harm. This court recognizes that in the absence of the security releases and other government payments many of these borrowers will suffer great

hardship, but this remedy is as far as this court is permitted to go under the *Chevron* balancing tests.

IT IS ORDERED:

1. As to any class member who received the defective notice of intent to take adverse action, but whose loan or loans had not been accelerated before May 7, 1987, FmHA is enjoined from accelerating such loans without first providing to that class member a set of the corrected notice forms required by this court's order of May 7, 1987, and without making available to that class member services as provided for in those corrected forms.

2. As to any class member whose loan or loans were accelerated on or between May 7, 1987, and the date of the entry of this order, FmHA is hereby ordered to reverse such acceleration, and treat such class member as provided in the paragraph numbered 1, above.

4. [sic] FmHA is hereby enjoined from initiating foreclosure or proceeding further with foreclosure or execution on any loan accelerated before May 7, 1987, until 30 days after the court determines that the corrected forms and explanations required by this court's order of May 7, 1987, are available in FmHA county offices.

Dated at Fargo, North Dakota, this 2nd day of June, 1987.

/s/Bruce M. Van Sickle
BRUCE M. VAN SICKLE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-83-47

DWIGHT COLEMAN, *et al.*,
Plaintiffs
v.
RICHARD E. LYNG, *et al.*,
Defendants

[Filed Feb. 17, 1984]

EXCERPTS FROM
MEMORANDUM AND ORDER

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* * *

C. Release of Chattel Security

In connection with either emergency or farm operating loans under the CFRDA, chattels such as machinery, crops, or livestock are pledged as security by the borrower. The release of that security, and the income derived from it, is governed by 7 C.F.R. § 1962.17 which provides, in part:

> Chattel security may be released only when release will not be to the financial detriment of FmHA.

> Borrowers will be strictly accountable to FmHA for the proper use of proceeds from the sale of security. Insurance proceeds will be treated the same as sale proceeds. The authority to release security for FmHA loans is different for basic security than for normal security.

"Basic security" is essentially the equipment or livestock which serve as the basis for the farming operation.[31] "Normal income security" is all other non-real estate security which is sold in the normal course of operating the farm.[32] There are explicit limitations on when a county supervisor may release normal income security. Basically such security may be released to pay 1) debts to FmHA, 2) operating expenses of the farm and home, 3) debts of the farm and home incurred for operating expenses, 4) income or social security taxes, 5) creditors with liens superior to FmHA liens, and 6) debts owed on essential real estate to creditors other than FmHA.[33]

On finding that the amount of income originally planned for the year will not be received, the county supervisor determines, in consultation with the borrower, how to use income that is available or will become available during the remainder of the planned year.[34] If other creditors have liens on the property from which the normal income is received, they must also be consulted. Priorities in distributing the income that will be available are as follows:

> 1. Pay necessary farm, home and other expenses planned for payment by cash as incurred;
>
> 2. Probate repayments on credit advanced for necessary farm, home and other operating expenses to FmHA and other creditors; and

31 7 C.F.R. § 1962.17(a).
32 *Id.*, subd. (b).
33 7 C.F.R. § 1962.17(b).
34 7 C.F.R. § 1962.17(c).

3. Make planned payments on other debts.

Release of both basic and normal income is based on information obtained from the borrower's operations as shown on his Annual Farm and Home Plan and Long-Time Farm and Home Plan.[35]

* * *

IV. Whether the nation-wide class is adequately defined.

[5] Defendants argue that "if issues from *Coleman* have already been raised or decided in a district [or circuit] then the nationwide class should not include the potential members of the class from that district [or circuit] on the issue or issues raised or decided there." At present, the class consists of all persons who have FmHA loans, are eligible for FmHA loans, or may be eligible for FmHA loans, but excludes borrowers who are presently involved in a suit, either as individuals or as members of a state-wide class, which "directly relates to the implementation of 7 U.S.C. § 1981a, the constitutionality of a pre-hearing cut-off of necessary family living and farm operating expenses, and the constitutionality of the Farmers Home Administration appeals procedure." Of course, those persons who have actually litigated their claims and received a final judgment by a court of competent jurisdiction are barred from entering the national class through the principle of res judicata.

Given this procedural setting, the defendants' argument is baffling. Apparently defendants want the Court to fragmentize the national class into dozens of subclasses, each of which is delineated by the "rule of law" of a particular district or circuit, even though the class members were not litigants before any court or personally subject to the ruling in any manner. It is true that if a class member were to bring a suit in a circuit that had resolved a determinative issue, the district court would be

35 7 C.F.R. § 1962.17(d).

obliged to follow that circuit ruling. But the class members in this suit are not before a different district court, and this Court is obligated to follow the decisions of the Eighth Circuit. Other circuit court rulings, which certainly provide strong persuasive precedent, are not controlling. To hold otherwise would undermine the primary justification of national class actions: judicial economy and efficiency. *See also* Fed.R.Civ.P. 1. Further piecemeal litigation will benefit no one.[53]

Therefore, IT IS ORDERED

A. That the plaintiff class shall consist of:

> "all persons who have obtained a farmer program loan from the Farmers Home Administration, and who are or may be eligible to obtain a farmer program loan from the Farmers Home Administration, and whose loans are or will be administered in the Farmers Home Administration offices located throughout the United States, but the national class does not include
>
> 1. borrowers who reside in states where a state-wide class action is requested (and not denied at a later time), or is already certified; or
>
> 2. borrowers who have presently filed actions that directly relate to the implementation of 7 U.S.C. § 1981a, the constitutionality of a

53 "The plaintiffs have repeatedly asserted, and the defense has not denied, that the Department of Agriculture's policy is to accept a trial court's order as to the plaintiffs in that particular case, and to continue to apply its own interpretation of the law in all areas where it has not been specifically challenged. This policy, while perhaps proper as a tactical decision, invites numerous lawsuits, all of which must be funded by persons who are suffering financial hardship, else they would not bring the action." Order dated October 28, 1983 at 5. *See also* Judge Alsop's comment, "It seems unfortunate to this court that substantial amounts of time and taxpayer dollars are being expended to litigate and decide essentially duplicative lawsuits." *Gamradt v. Block*, 581 F.Supp. 122, 126 (D.Minn.1983).

pre-hearing cut-off of necessary family living and farm operating expenses, and the constitutionality of the Farmers Home Administration appeals procedure."

This Court presumes that all litigants who are presently before another court on the same issues have opted out; however, such litigants may request permission from their presiding court to enter the national class.

B. That the defendants, their agents, subordinates, and employees are enjoined from proceeding to liquidate, or to terminate the living and operating allowance previously determined in the administration of any existing loan unless:

1. the defendants shall give any plaintiff against whom defendants propose to proceed at least 30 days notice:

a. that informs the borrower of his right to an informal hearing to contest the liquidation or termination and to establish eligibility for loan deferral pursuant to 7 U.S.C. § 1981a;

b. That provides the borrower with a statement that gives the reasons for the proposed liquidation or termination;

c. That informs the borrower of the factors that determine eligibility for loan deferral; and

d. That informs the borrower of the official who would preside at the informal hearing. The official designated shall not have been actively involved in the initial decision of liquidation or termination.

2. The official presiding at any informal hearing shall present his decision in writing, giving his reasons therefore, which decision shall be furnished to the borrower.

C. That the defendants, their agents, subordinates, and employees, are enjoined from:

--Accelerating the indebtedness of the plaintiffs,

--Foreclosing on the real property or chattels of the plaintiffs,

--Demanding voluntary conveyance by the plaintiffs, or

--Repossession chattels of the plaintiffs or in any way proceeding against or depriving the plaintiffs of property in which the defendants have a security interest,

unless:

1. defendants shall give any plaintiffs against whom the defendants propose to proceed at least 30 days notice:

a. That informs the borrower of his right to a hearing to contest the proposed action and to establish eligibility for loan deferral pursuant to 7 U.S.C. § 1981a;

b. That provides the borrower with a statement that gives the reasons for the proposed action;

c. That informs the borrower of the factors that determine eligibility for loan deferral;

d. That informs the borrower of the official who would preside at the hearing. The official designated shall not have been actively involved in the initial decision to take the proposed action.

2. The official presiding at any such hearing shall present his decision in writing, giving his reasons therefore, which decision shall be furnished to the borrower.

D. Before moving for judgment of foreclosure in existing actions by FmHA, the defendants shall comply with section C above.

E. Nothing in this order shall prevent the *bona fide* "graduation" of a plaintiff into traditional loan services pursuant to the applicable statutes and regulations.[57]

This injunction is subject to the following limitations:

1. Where the borrower has totally abandoned any secured property and that property is at substantial risk of irreparable injury, defendants may take the necessary steps to protect the secured property; however, once the necessary steps have been taken to protect the property, or where there is abandonment of the property and no substantial risk of irreparable injury, defendants shall comply with the requirements of this injunction.

2. Defendants may proceed with foreclosure where the borrower knowingly and voluntarily consents to foreclosure in writing. However, where a borrower consents to foreclosure following the termination or substantial reduction of family living or farm operating expenses, the FmHA must establish, in any subsequent proceeding contesting the foreclosure, that the borrower's decision to allow foreclosure was voluntarily made, not coerced by the termination or reduction of living and operating expenses, and made with full knowledge of his rights, including the right to appeal the

57 *See, e.g.*, 7 C.F.R. § 1843.30 (1983); 7 C.F.R. § 1951.261 (initially published at 48 Fed. Reg. 40,204-07 (1983)). *But see* 7 C.F.R. § 1980.147 (subpart B, farmer program loans, "no graduation requirement for guaranteed loans"), § 1980.290 (subpart C, "no 'graduation' requirement for [emergency livestock] loans"), and § 1980.589 (subpart F, economic emergency loans, "no 'graduation' requirement for guaranteed loans").

decision concerning living and operating expenses and to request deferral under 7 U.S.C. § 1981a.

3. Where a borrower is found guilty of conversion, defendants may immediately terminate family living and farm operating expenses, take the necessary steps to protect the property, and initiate foreclosure proceedings; nonetheless, such a borrower must still be afforded an opportunity to apply for deferral under 7 U.S.C. § 1981a.

4. This injunction shall not apply to situations where a) the borrower initiates Chapter 7 bankruptcy and the trustee in bankruptcy abandons the property to the United States or to another lienholder who commences foreclosure; and b) the borrower is discharged in bankruptcy.

APPENDIX F

Calendar No. 452

100th CONGRESS *1st Session* | SENATE | REPORT 100-230

FARM CREDIT ACT AMENDMENTS OF 1987

November 20 (legislative day, NOVEMBER 19), 1987—Ordered to be printed

Mr. LEAHY, from the Committee on Agriculture, Nutrition, and Forestry, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[EXCERPTS FROM REPORT]

* * *

TITLE VI—
FARMERS HOME ADMINISTRATION LOAN RESTRUCTURING

This Title applies the advantages of a loan restructuring program to the Department of Agriculture's Farmers Home Administration (FmHA). This will allow the Department to convert a lot of its nonperforming loans into paying assets. At the same time low-income farmers will be given a second chance—benefiting their rural communities and their families.

Under Title VI the Secretary of Agriculture must provide notice of all available loan service programs, including restructuring options, to each FmHA borrower who is 180 days delinquent on an FmHA loan and, also, before taking any adverse foreclosure action against a borrower. FmHA has 45 days from receipt of a request for loan restructuring or other servicing to approve or deny the request.

FmHA must establish a national appeals division to hear appeals of local decisions adverse to the FmHA borrower, for example, on restructuring.

To encourage farmers and their families to remain in their communities Title VI allows them a priority in the purchase or lease of their farmland acquired by FmHA through foreclosure. Four types of persons shall have this priority: the immediate previous FmHA borrower-owner, or spouse or child, operators of not larger than family-size farms, and Indian tribal members, tribal corporations or tribal councils regarding Indian reservation lands. This Title also establishes a demonstration program to use the existing FmHA interest rate buydown program to facilitate the sale of FCS inventory land to new and restarting farmers.

Title VI also provides certain farmers with "income releases" (releases of their income that would have been diverted to FmHA to satisfy an FmHA lien on the crops, livestock or other farm assets). Farmers who remain on the farm, whose FmHA loans were associated [sic—ACCELERATED?] between November 1, 1985 and May 7, 1987 (farmers affected by the *Coleman v. Lyng* court decisions), shall be entitled to 12 months of income release for household and operating expenses (not in excess of $18,000 per year per borrower) if the borrower timely applies for loan restructuring. The income release shall continue after 12 months if the Secretary does not timely decide on the farmer's restructuring request. These provisions are intended to carry out the intent of the *Coleman* decisions in the context of this reform of FmHA practices.

The title also requires the Secretary to establish a program to modify delinquent FmHA loans to the maximum extent possible to avoid losses to the Secretary (with emphasis on the writing-down of principal and interest and debt set-aside) whenever this would facilitate keeping the borrower on the farm or ranch.

The title also calls for the creation, by the Secretary of Agriculture, of a program providing for a secondary market in the guaranteed portions of FmHA loans. This program is to be similar to the current Small Business Administration (SBA) program for SBA loans. This program should provide additional capital for rural banks to lend farmers and rural communities since loans guaranteed by FmHA can be sold into the secondary market. Local participating banks can use the money from those sales for additional agricultural lending.

* * *

PURPOSE AND NEED FOR LEGISLATION

The current credit system serving American agriculture has been in place since the 1930s. Over the last fifty years the structure of American agriculture has changed greatly and the credit needs of farmers in recent years have not been adequately served by the existing structure. Farmers and ranchers have faced bankruptcies and foreclosures unprecedented since the Great Depression. Commodity prices and farm land values, while stabilized at least temporarily, remain near record lows in inflation-adjusted terms.

Credit is now a vital element to most farmers. This bill, S. 1665, creates an impetus for a major reorganization of the credit delivery mechanism for American agriculture ensuring farmers improved access to credit at competitive rates. The financial turmoil of the last few years has shown that financial difficulties of farm lenders have contributed significantly to the problems of farmers.

During periods of depressed commodity prices and falling farm land values, farmers need, more than ever, access to reasonably priced credit. Yet, pressures on all farm lenders to offset losses has too often pushed up interest rates to farmers and merely accelerated their financial difficulties.

This legislation addresses all aspects of the agricultural credit situation. S. 1665 improves the ability of the Farm Credit System (FCS) to serve farmers. It also begins to make the Farmers Home Administration (FmHA) more responsive to the financial crisis in agriculture and creates a secondary market which will enhance the ability of the Farm Credit System, commercial banks, and life insurance companies to supply credit to agriculture at fixed rates, on more favorable terms, and at competitive rates.

Distressed FCS and FmHA borrowers, who often through no fault of their own, are now facing foreclosure, will be given a second chance in cases where restructuring loans is less costly than foreclosure. Ultimately, all farmer-borrowers will be aided. Federal financial assistance will help cut borrowing costs for all FCS institutions which will be passed on to farmers and ranchers in the form of lower interest rates. Both FCS and FmHA borrowers will be given expanded rights regarding their loans and farm property.

Over the past five years both farmers, and their lenders, have experienced major shocks as the agricultural boom of the 1970s collapsed. Many farmers saw their net worth decline by more than half as land values plummeted from their 1982 peak. Events outside the farmers' control, declining land values, falling machinery values and lower commodity prices all reduced farmers' net worth. In addition, a significant number of farmers experienced falling income, although aggregate farm income remained strong as a result of increased Government payments.

* * *

TITLE VI—FARMERS HOME ADMINISTRATION

Notice of Loan Service Programs.—...

....

In a series of opinions and orders, a United States District Court in North Dakota has ordered FmHA to provide improved notices to FmHA borrowers which explain their options and clearly inform them of their rights. These decisions include *Coleman v. Block,* 580 F. Supp. (D.N.D. 1984). *Coleman v. Lyng,* Civ. A1-83-47, Memorandum and Order (D.N.D. May 7, 1987); and *Coleman v. Lyng,* Civ. A1-83-47, Memorandum and Order (D.N.D. June 2, 1987). The Committee intends that the FmHA notices required by Title VI of S. 1665 be easy to read, informative, and helpful to FmHA borrowers, and that they clearly set forth servicing options in a timely and constructive manner. This title of S. 1665 is based on careful analysis of the *Coleman* opinions and is designed to address, for the future, the notice issues raised in that case.

* * *

Income Release.—Section 608 of Title VI requires FmHA to release its security interest in the farmer's production income and ASCS payments so that farmers can use this money to pay essential living and operating expenses. The Secretary must continue to make these releases until the farmer's accounts are accelerated.

This section specifically addresses one of the classes of plaintiffs in the *Coleman* case mentioned earlier. This class consists of around 14,000 borrowers whose FmHA accounts were accelerated but who received a notice which did not properly advise them of their rights. This title requires the Secretary to begin making income releases, upon the request of the borrower, of up to $18,000 per year, for those borrowers who are actively engaged in farming. It also requires FmHA to continue to release income until the FmHA has made a final

determination on the borrower's application for debt restructuring.

These income releases will benefit rural communities as a whole by ensuring that farmers can pay their local suppliers and businesses, and local property taxes. This section will also benefit the Farm Credit System and local banks by allowing farmers whose production income is controlled by FmHA to pay on their first mortgages to the local Farm Credit System institutions.

It will allow the 14,000 borrowers whose accounts have already been accelerated by FmHA the opportunity to have their loans restructured. Eventually, with restructuring many of these borrowers will be able to continue farming. But these borrowers will not be able to keep their farms in operation, or their families fed and clothed, if their releases are terminated during the months FmHA takes to issue regulations and consider them for such restructuring.

APPENDIX G

EXCERPTS FROM
TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

* * *

Subcommittee on Agricultural Credit
of the

COMMITTEE ON AGRICULTURE,
NUTRITION, AND FORESTRY

* * *

MARKUP ON FARM CREDIT ACT
AMENDMENTS OF 1987

* * *

Washington, D.C.
October 30, 1987

* * *

Senator Boren. Certainly we would not want it to stretch more than in the two years because you have got this court case and you have got the restructuring plan that we put in place in the bill. And we are certainly getting down. I think this has been very helpful, this change in terms of the asset release. I think we are getting, it seems to me, close to something that could be reasonable here.

If we would put an overall cap on it on maximum amount and also a limitation as to how long this could go on. Now I understand your concern if we put a flat one year that there might be an incentive for the agency to sort of string them out until 12 months is over and the day after that put them off until after the year to act on their restructuring or something. Because they will be thrown back into the restructuring pool, will they not, these that are under the court case? I mean that it is a possibility that they will be.

So the restructuring takes—how long do we think the restructuring with the appeals and reconsiderations and all?

* * *

Senator Harkin. Again, let us back up a little bit. Senator Lugar is correct. These people are out there. In many cases the value of their assets has decreased by 50 to 60 percent. But what we are talking about, again, here is restructuring. Now if you want to say, well, I am sorry, you people are below the line, get out, well, then let us just let them go all Chapter 12. That is the way to go.

But what we are saying is, again, through restructuring it is going to cost us less money overall. Some of these farmers, not all, but some of these farmers, especially those I think those 50 percent that have notified because of adverse action—those are the more aggressive ones—through restructuring they will be able to make it and pay back. But without restructuring, you are right. They are never going to make it.

But I thought what we were trying to do here in both Farm Credit System and in Farm Home was to do something that would restructure them so that they would pay back. So, yeah, if you want to say—

Senator Lugar. But you are making a fundamental assumption, I suppose it may be correct, that these persons for whom acceleration has already been called, there are within this group some who through restructuring are going to be able to get back.

Senator Boren. Because we have a new restructuring that really is much better than the old one.

Senator Harkin. The same in the Farm Credit System.

Senator Conrad. Mr. Chairman, if I might just give a practical example. I just came from North Dakota this weekend. I was in Benson County. 35 people there have been given notice of administrative offsets. They are going to be taking from those people, where they have a lien, all their non-program payments, they are going to be taking from them all of their other federal payments. That will end those people's role in farming. How did they get into that position?

Most of those people had received emergency loans at 14 percent interest. They received emergency loans because of a disaster that occurred in that county. No way they can pay back 14 percent loans based on current income. If we do not buy some time for those people to have a chance to restructure, they are liquidated. They are just wiped out. And I think what Tom is saying is correct. If you do not give them the release of operating expenses even though those operations would cash flow if they are restructured, you have consigned them to the junk heap, and they do not necessarily need to be there.

APPENDIX H

House Report (Agriculture Committee) No. 100-295(I), Aug. 28, 1987 [To accompany H.R. 3030]

HOUSE REPORT No. 100-295(I)

[EXCERPTS FROM REPORT]

* * *

A majority of the Committee Members felt strongly that any agricultural credit package reported this year should contain reform of the Farmers Home Administration. These Members were decidedly frustrated with Farmers Home Administration's intransigence in dealing with problem loans in a sensitive and compassionate manner commensurate with its role as the Federal government's lender of last resort. During the last several years, Federal courts have frequently over-ridden FmHA and virtually mandated many of FmHA's policies and management actions. The Committee would have much preferred the Agency's adherence to the compassionate spirit of the law and the Agency's long tradition helping needy borrowers.

APPENDIX I

Pub. L. 99-198 [H.R. 2100]: December 22, 1985

Food Security Act of 1985

* * *

RELEASE OF NORMAL INCOME SECURITY

Sec. 1315. Section 335 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1985) (as amended by section 1314(3) is further amended by adding at the end thereof the following new subsection:

"(f)(1) As used in this subsection, the term 'normal income security' has the same meaning given such term in section 1962.17(b) of title 7, Code of Federal Regulations (as of January 1, 1985).

"(2) Until such time as the Secretary accelerates a loan made or insured under this title, the Secretary shall release from the normal income security provided for such loan an amount sufficient to pay the essential household and farm operating expenses of the borrower, as determined by the Secretary.".

APPENDIX J

EXCERPTS FROM AGRICULTURAL CREDIT ACT OF 1987

TITLE VI—FARMERS HOME ADMINISTRATION LOANS

* * *

SEC. 605. NOTICE OF LOAN SERVICE PROGRAMS.

Subtitle D (7 U.S.C. 1981 et seq.) is amended by inserting after section 331C the following new section:

"SEC. 331D. NOTICE OF LOAN SERVICE PROGRAMS.

"(a) REQUIREMENT.—The Secretary shall provide notice by certified mail to each borrower who is at least 180 days delinquent in the payment of principal or interest on a loan made or insured under this title.

"(b) CONTENTS.—The notice required under subsection (a) shall—

"(1) include a summary of all primary loan service programs, preservation loan service programs, and appeal procedures, including the eligibility criteria, and terms and conditions of such programs and procedures;

"(2) include a summary of the manner in which the borrower may apply, and be considered, for all such programs, except that the Secretary shall not require the borrower to select among such programs or waive any right in order to be considered for any program carried out by the Secretary;

"(3) advise the borrower regarding all filing requirements and any deadlines that must be met for requesting loan servicing;

"(4) provide any relevant forms, including applicable response forms;

"(5) advise the borrower that a copy of regulations is available on request; and

"(6) be designed to be readable and understandable by the borrower.

"(c) CONTAINED IN REGULATIONS.—All notices required by this section shall be contained in the regulations implementing this title.

"(d) TIMING.—The notice described in subsection (b) shall be provided—

"(1) at the time an application is made for participation in a loan service program;

"(2) on written request of the borrower; and

"(3) before the earliest of—

"(A) initiating any liquidation;

"(B) requesting the conveyance of security property;

"(C) accelerating the loan;

"(D) repossessing property;

"(E) foreclosing on property; or

"(F) taking any other collection action.

"(e) CONSIDERATION OF BORROWERS FOR LOAN SERVICE PROGRAMS.—The Secretary shall consider a farmer program borrower for all loan service programs if, within 45 days after receipt of the notice required in this section, the borrower requests such consideration in writing. In considering a borrower for loan service programs, the Secretary shall place the highest priority on the preservation of the borrower's farming operations.".

* * *

SEC. 611. INCOME RELEASE.

Subsection (f) of section 335 (7 U.S.C. 1985(f)) is amended to read as follows:

"(f)(1) As used in this subsection, the term 'normal income security' means all security not considered basic security, including crops, livestock, poultry products, Agricultural Stabilization and Conservation Service payments and

Commodity Credit Corporation payments, and other property covered by Farmers Home Administration liens that is sold in conjunction with the operation of a farm or other business, but shall not include any equipment (including fixtures in States that have adopted the Uniform Commercial Code), or foundation herd or flock, that is the basis of the farming or other operation, and is the basic security for a Farmers Home Administration farmer program loan.

"(2) The Secretary shall release from the normal income security provided for such loan an amount sufficient to pay for the essential household and farm operating expenses of the borrower, until such time as the Secretary accelerates such loan.

"(3) A borrower whose account was accelerated on or after November 1, 1985, and on or before May 7, 1987, but not thereafter foreclosed on or liquidated, shall be entitled to the release of security income for a period of 12 months, to pay the essential household and farm operating expenses of such borrower in an amount not to exceed $18,000 over 12 months, if such borrower—

"(A) as of October 30, 1987, continued to be actively engaged in the farming operations for which the Secretary had made the farmer program loan; and

"(B) as of the deadline for responding to the notice provided for under paragraph (5), requests restructuring of such loans pursuant to section 353.

"(4) The county committee in the county in which borrower's land is located shall determine whether the borrower has complied with the requirements of paragraph (3)(A).

"(5)(A) Within 45 days after the date of the enactment of this subsection, the Secretary shall provide to the borrowers described in paragraph (3) notice by certified mail of the right of such borrowers to apply for the benefits under such paragraph.

"(B) Releases under such paragraph shall be made to qualified borrowers who have responded to the notice within 30 days after receipt.

"(C) Within 12 months after a borrower has requested restructuring under section 353, the Secretary shall make a final determination on the request. Notwithstanding the 12-month limitation provided for in paragraph (3), releases shall continue to be made to the borrower until a denial or dismissal of the application of the borrower for restructuring under section 353 is made. The amount of essential household and farm operating expenses which may be released to any borrower eligible for such releases after 12 months may exceed $18,000, by an amount proportionate to the period of time beyond 12 months before a final determination is made by the Secretary.

"(6) If a borrower is required to plan for or to report on how proceeds from the sale of collateral property will be used, the Secretary shall—

"(A) notify the borrower of such requirement; and

"(B) notify the borrower of the right to the release of funds under this section and the means by which a request for the funds may be made.

"(7) The Secretary shall issue regulations consistent with this section that—

"(A) ensure the release of funds to each borrower; and

"(B) establish guidelines for releases under paragraph (3), including a list of expenditures for which funds will normally be released.".

* * *

SEC. 615. DEBT RESTRUCTURING AND LOAN SERVICING.

(a) IN GENERAL.—Subtitle D (7 U.S.C. 1981 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 353. DEBT RESTRUCTURING AND LOAN SERVICING.

"(a) IN GENERAL.—The Secretary shall modify delinquent farmer program loans made or insured under this title, or purchased from the lender or the Federal Deposit Insurance

Corporation under section 309B, to the maximum extent possible—

"(1) to avoid losses to the Secretary on such loans, with priority consideration being placed on writing-down the loan principal and interest (subject to subsections (d) and (e)), and debt set-aside (subject to subsection (e)), whenever these procedures would facilitate keeping the borrower on the farm or ranch, or otherwise through the use of primary loan service programs as provided in this section; and

"(2) to ensure that borrowers are able to continue farming or ranching operations.

"(b) ELIGIBILITY.—To be eligible to obtain assistance under subsection (a)—

"(1) the delinquency must be due to circumstances beyond the control of the borrower, as defined in regulations issued by the Secretary;

"(2) the borrower must have acted in good faith with the Secretary in connection with the loan as defined in regulations issued by the Secretary;

"(3) the borrower must present a preliminary plan to the Secretary that contains reasonable assumptions that demonstrate that the borrower will be able to—

"(A) meet the necessary family living and farm operating expenses; and

"(B) service all debts, including those of the loans restructured; and

"(4) the loan, if restructured, must result in a net recovery to the Federal Government, during the term of the loan as restructured, that would be more than or equal to the net recovery to the Federal Government from an involuntary liquidation or foreclosure on the property securing the loan.

"(c) RESTRUCTURING DETERMINATIONS.—

"(1) DETERMINATION OF NET RECOVERY.—In determining the net recovery from the involuntary liquidation of a loan under this section, the Secretary shall calculate—

"(A) the recovery value of the collateral securing the loan, in accordance with paragraph (2); and

"(B) the value of the restructured loan, in accordance with paragraph (3).

"(2) RECOVERY VALUE.—For the purpose of paragraph (1), the recovery value of the collateral securing the loan shall be based on—

"(A) the amount of the current appraised value of the property securing the loan; less

"(B) the estimated administrative, legal, and other expenses associated with the liquidation and disposition of the loan and collateral, including—

"(i) the payment of prior liens;

"(ii) taxes and assessments, depreciation, management costs, the yearly percentage decrease or increase in the value of the property, and lost interest income, each calculated for the average holding period for the type of property involved;

"(iii) resale expenses, such as repairs, commissions, and advertising; and

"(iv) other administrative and attorney's costs.

"(3) VALUE OF THE RESTRUCTURED LOAN.—

"(A) IN GENERAL.—For the purpose of paragraph (1), the value of the restructured loan shall be based on the present value of payments that the borrower would make to the Federal Government if the terms of such loan were modified under any combination of primary loan service programs to ensure that the borrower is able to meet such obligations and continue farming operations.

"(B) PRESENT VALUE.—For the purpose of calculating the present value referred to in subparagraph (A), the Secretary shall use a discount rate of not more than the current rate on 90-day Treasury bills.

"(4) NOTIFICATION.—Within 60 days after receipt of a written request for restructuring from the borrower, the Secretary shall—

"(A) make the calculations specified in paragraphs (2) and (3);

"(B) notify the borrower in writing of the results of such calculations; and

"(C) provide documentation for the calculations.

"(5) RESTRUCTURING OF LOANS.—If the value of the restructured loan is greater than or equal to the recovery value, the Secretary shall, within 45 days after notifying the borrower of such calculations, offer to restructure the loan obligations of the borrower under this title through primary loan service programs that would enable the borrower to meet the obligations (as modified) under the loan and to continue the farming operations of the borrower. If the borrower accepts such offer, within 45 days after receipt of notice of acceptance, the Secretary shall restructure the loan accordingly.

* * *

"(f) DETERMINATION TO RESTRUCTURE.—If the appeal process results in a determination that a loan is eligible for restructuring, the Secretary shall restructure the loan in the manner consistent with this section, taking into consideration the restructuring recommendations, if any, of the appeals officer.

"(g) PREREQUISITES TO FORECLOSURE OR LIQUIDATION.—No foreclosure or other similar actions shall be taken to liquidate any loan determined to be ineligible for restructuring by the Secretary under this section—

"(1) until the borrower has been given the opportunity to appeal such decision; and

"(2) if the borrower appeals, the appeals process has been completed, and a determination has been made that the loan is ineligible for restructuring.

"(h) TIME LIMITS FOR RESTRUCTURING.—Once an appeal has been filed under section 333B, a decision shall be made at each level in the appeals process within 45 days after the receipt of the appeal or request for further review.

* * *

(d) SUSPENSION OF COLLECTION ACTIVITIES DURING TRANSITION PERIOD.—The Secretary of Agriculture shall not initiate any acceleration, foreclosure, or liquidation in connection with any delinquent farmer program loan before the date the Secretary has issued final regulations to carry out the amendments made by this section. The preceding sentence shall not prohibit the Secretary from taking any action with respect to waste, fraud, or abuse by the borrower.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

A1-83-47

DWIGHT COLEMAN, *et al.*,
Plaintiffs
v.
RICHARD E. LYNG, *et al.*,
Defendants

EXCERPTS FROM
DECLARATION OF GLENN J. HERTZLER, JR.

---

1. I am the Assistant Administrator, Farmers Programs, of the Farmers Home Administration (FmHA), United States Department of Agriculture. I am responsible for the day-to-day operations of the farm loan programs, including the implementation of the regulations published on November 1, 1985, at 50 F.R. 45740, entitled, "Special Supervision of Delinquent and Problem Case FmHA Farm Borrowers."

* * *

6....

(c) The relief Plaintiffs seek would require FmHA to provide releases for family living and farm operating expenses to those borrowers whose accounts have already been accelerated. I

estimate that it would cost FmHA $969,000,000 per year to provide family living and farm operating expenses to borrowers whose accounts have been accelerated. Based on information in FmHA's records, I determined that the 14,202 borrowers whose accounts have been accelerated incur average family living expenses in the amount of $11,871 per year and that 75 percent of these borrowers would request releases from FmHA (14,202 x $11,871 x .75 divided by 12 or $11,000,000 per month.) On an annual basis this is $126,000,000. Based on FmHA's records, I also determined that 14,202 accelerated borrowers use an average of $79,123 farm operating expenses per year, and that 75 percent would need releases from FmHA. The estimated total of this item is $843,000,000 per year (14,202 x $79,123 x .75) or an average of $70,000,000 per month.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this day of May 19, 1987.

/s/Glenn J. Hertzler, Jr.
Glenn J. Hertzler, Jr.
Farmers Home Administration

Supreme Court, U.S.
FILED
OCT 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-47

In the Supreme Court of the United States

OCTOBER TERM, 1989

DWIGHT COLEMAN, ET AL., PETITIONERS

v.

CLAYTON K. YEUTTER, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Agricultural Credit Act of 1987 rendered moot the claims of those farmers whose debts with the Farmers Home Administration had been accelerated before May 7, 1987, but who still retained title to their property as of June 2, 1987.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 864 F.2d 604. The orders of the district court (Pet. App. 19a-25a, 26a-28a) are reported at 663 F. Supp. 1315.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1988. A petition for rehearing was denied on February 1, 1989. Pet. App. 18a. On April 17, 1989, Justice Blackmun extended the time to file the petition for a writ of certiorari to June 30, 1989. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Farmers Home Administration (FmHA) makes loans to assist farm operations. This action is brought on behalf of a class of virtually all borrowers from the FmHA,[1] and concerns the FmHA's procedures for administering delinquent loans. In February 1984, the district court entered a permanent injunction precluding FmHA from taking any adverse action against delinquent members in the class until it had provided all class members with a notice containing specified elements, and an opportunity for a hearing. *Coleman* v. *Block*, 580 F. Supp. 194 (D.N.D. 1984).

Although the February 1984 injunction did not require FmHA to promulgate regulations, over the course of the next year the agency decided to do so. On November 1, 1985, the FmHA published final regulations in the Federal Register. 50 Fed. Reg. 45,740. In January 1986, FmHA began to send Notices of Intent to Take Adverse Action — so-called Form 1924-25 [2] — to certain groups of borrowers who had defaulted on their loans. Pet. App. 3. The notice advised the borrower of the delinquency and of the need to contact the FmHA county supervisor to determine whether any loan-servicing alternatives to foreclosure were available. Under those regulations, each borrower could ask to be considered for various loan-servicing options. If a borrower made such a request, no adverse action could occur until after: (1) informal conferences, (2) a formal hearing, (3) a notice of adverse decision, and (4) possibly an administrative appeal. If,

---

[1] The class does not include the borrowers in six states. See *Coleman* v. *Block*, 100 F.R.D. 705 (D.N.D. 1983).

[2] The forms which underlie this litigation — FmHA Forms 1924-14, 1924-25, and 1924-26 — are described in the court of appeals' opinion. See Pet. App. 4a-5a.

after that process, the borrower was not found eligible for any loan-servicing options, he would then receive notice that his loan was being accelerated. Pet. App. 3a.

2. In February 1986, petitioners filed a first amended supplemental class action complaint. The supplemental complaint was an attempt to stop the new FmHA regulations from going into effect. Pet. App. 3a & n.2. The supplemental complaint's principal claim (Claim 10) was that the notice forms 1924-25 and 1924-26 violated the Fifth Amendment guarantee of due process. See, *e.g.*, Pet. App. 5a. Petitioners moved for a preliminary injunction that would have precluded FmHA from sending those notices to delinquent borrowers. On March 3, 1986, the district court denied petitioners' request, except in one minor respect not relevant here. *Coleman* v. *Block*, 632 F. Supp. 1005 (D.N.D. 1986). Accordingly, FmHA proceeded to send notices to delinquent borrowers and to consider borrowers for loan-servicing options under FmHA regulations. By May 7, 1987, approximately 14,000 borrowers had either not pursued or had exhausted all administrative appeals; 1000 of these borrowers had lost title to the secured property through foreclosure. See Pet. App. 7a, 26a-28a.

3. On May 7, 1987, the district court granted summary judgment largely in favor of FmHA. The court dismissed 11 of plaintiffs' 14 claims in their entirety; it dismissed, in part, two other claims.[3] See Pet. App. 3a-4a, 24a. One of those two claims was Claim 10, which was at issue in the court of appeals.

The major thrust of Claim 10 was petitioners' due process challenge to Form 1924-25 — the "Notice of Intent to Take Adverse Action." The district court rejected

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[3] The remaining claim was not addressed by the court because it was proceeding to settlement.

petitioners' challenge. It ruled that Form 1924-25 embodied a reasonable compromise between the dual goals of providing complete notice of the various loan-extension or loan-replacement programs and ensuring that the notice could be understood by its intended recipients. Pet. App. 20a.

The district court agreed with petitioners, however, that Form 1924-26 — the "Borrower Acknowledgement of Notice of Intent to Take Adverse Action" — was inadequate. That form directed the borrower to return to the FmHA (within 30 days) the form after the borrower had signified which of the loan-servicing options or other alternatives (appeal, curing defaults, or liquidation) he preferred. The district court noted that the choices made by the borrower on the form could be binding. Pet. App. 5a, 21a-22a. And the court stated: "Because of the potential impact of this form, and particularly because of the number and complexity of the options available, the notice given borrowers must be both clear and comprehensive." *Id.* at 22a. The court found, however, that Form 1924-26 failed under that standard. *Ibid.* In particular, the court ruled that Form 1924-26 did not take into account the facts that the borrower may have more than one loan and FmHA may have more than one reason for the intended adverse action. *Id.* at 23a-24a. Thus, the district court ruled that Form 1924-26 was inadequate under the Due Process Clause. *Id.* at 24a.

To remedy that perceived violation, the court ordered three types of injunctive relief. First, it ordered FmHA to amend Form 1924-26 by adding a prominent statement declaring that an explanation of the various options listed on the form, as well as the effect of choosing one of them, was available at the county FmHA office. Pet. App. 24a. Second, it required FmHA to amend Form 1924-26 by allowing borrowers to choose separate options for each

loan and for each reason given for each of FmHA's proposed actions. *Id.* at 25a. And third, the court ordered FmHA to file with the court and to deliver to petitioners' counsel, within 30 days, a comprehensive and clear explanation of each of the options listed on Form 1924-26. *Id.* at 24a-25a.

4. On June 2, 1987, the court granted additional injunctive relief. Pet. App. 26a-28a. The court divided the class into subgroups on the basis of how far through the loan-servicing process a plaintiff had progressed. The court then ordered the following: (1) for all class members whose loans had not been accelerated prior to May 7, 1987, FmHA was enjoined from accelerating such loans without providing new notices and without making available all loan-servicing options provided for in the corrected forms (Pet. App. 28a); (2) FmHA was required to reverse the loan accelerations for all borrowers whose loans were accelerated between May 7, 1987, and June 2, 1987 (*ibid.*); and, (3) with respect to borrowers whose loans had been accelerated prior to May 7, 1987, but who still retained title to their property as of June 2, 1987,[4] the court enjoined FmHA from proceeding further with foreclosure proceedings until the court was satisfied that the additional written explanations and corrected forms were available in each county office. *Ibid.*

5. Both sides filed cross-appeals. Meanwhile, Congress adopted the Agricultural Credit Act of 1987, Pub. L. No. 100-233, Tit. VI, §§ 601-626, 101 Stat. 1665-1685 (Credit Act). The court of appeals ruled that the Credit Act mooted the cross-appeals. Pet. App. 1a-17a. The court of appeals observed that the legislative history of the Credit Act made it very clear that the Act was intended to address this specific litigation. The court stated that

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[4] About 13,000 class members fell within this subgroup. Pet. App. 7a.

"Congress's obvious intent was that the 1987 Act would function as a legislative enactment of the remedy for the grievances presented in this case." *Id.* at 14a. Accordingly, it vacated the district court's injunction and remanded the case to the district court with directions to dismiss the action as moot. *Id.* at 17a.

The court of appeals rejected petitioners' argument that the claims of some class members remained alive because they sought more relief than was provided by the Credit Act. Pet. App. 12a-16a. Under the Credit Act, borrowers whose loans were accelerated before May 7, 1987, but who still retained title to their property when the district court entered its June 2, 1987, order, were entitled to "the release of up to $18,000 of security income over twelve months to pay the essential household and farm operating expenses." *Id.* 12a.[5] Petitioners argued that some class members might have received greater releases of security income if they had prevailed on their due-process claims before the Credit Act was adopted. The court of appeals held, however, that it "lack[ed] the power to add or subtract from the remedy enacted by Congress." *Id.* at 14a. The court stated:

> [It] is only a statute that entitles an FmHA borrower to a release of income from the sale of secured crops: Nothing in the Constitution itself guarantees farmers such a security income release. Although plaintiffs might obtain injunctive relief ordering the provision of statutory benefits denied without due process, courts have no further remedial power when Congress validly amends the statute authorizing benefits.

Id. at 16a.

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[5] The phrase "security income" refers to income derived from the sale of crops and goods in which FmHA has acquired security interests under the loan agreements.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with the decision of any other court. Moreover, as petitioners admit (Pet. 9), this case will not have any future importance. [6] Accordingly, no further review is warranted.

1. The sole issue presented relates to the group of 13,000 borrowers whose debts were accelerated prior to May 7, 1987, and who still retained title to their property as of June 2, 1987. [7] With regard to that group, the court of appeals accurately recognized that, in some respects, "the [Credit] Act mandates more relief than the District Court actually ordered." Pet. App. 12a. The Credit Act required FmHA to reconsider the debts of that group of borrowers so that the borrowers would have a fair chance to avoid acceleration and foreclosure. The procedural relief enacted by Congress was essentially similar to the remedy ordered by the trial court. The Credit Act also required FmHA to act on those loans within 12 months, and it provided for the release of security income to pay for living and operating expenses during that reconsideration period. The amount of security income releases was limited to $18,000. § 611, 101 Stat. 1673.

The court of appeals, of course, properly looked to the law as it existed when it ruled. See, *e.g.*, *United States Dep't of Justice* v. *Provenzano*, 469 U.S. 14, 15 (1984); *Kremens* v. *Bartley*, 431 U.S. 119, 128-132 (1977); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 165 (1975); *Fusari* v. *Steinberg*, 419 U.S. 379, 387 (1975). In this case, Congress

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[6] Petitioners state that "this is a case of first, and possibly last, impression in which the interpretation of these legislative provisions will be considered." Pet. 9.

[7] The court of appeals' opinion refers to this group as the "second group" of borrowers. See Pet. App. 7a-8a.

adopted the Credit Act with this litigation in mind, [8] and Congress added subsection (f)(3) to 7 U.S.C. 1985 to address the specific question of security-income releases for any "borrower whose account was accelerated on or after November 1, 1985, and on or before May 7, 1987." Moreover, the statute's language is plain — release of security income is limited to $18,000 during one year. See 7 U.S.C. 1985(f)(3). Accordingly, Congress has unambiguously provided a remedy for petitioners' due process claim — a fair process for reconsideration by FmHA and the release of up to $18,000 in security income during that process. See Pet. App. 48a-55a.

2. Petitioners argue (Pet. 9-20) that, under prior law, some of the borrowers in the relevant group might have received income releases that exceeded $18,000 if they had obtained all the relief that they sought in the trial court.[9] That may be true but it is wholly irrelevant. A release of security income is a statutory "benefit"; a delinquent borrower is not entitled to such a release under the Constitution or any loan document. And under the Credit Act, Congress has expressly limited such releases to $18,000 per year. Accordingly, petitioners' prior request for a remedy that might have provided a greater release of security income is moot. See generally *Atkins* v. *Parker*, 472 U.S. 115, 129-130 (1985) ("a welfare recipient is not

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[8] The Credit Act was designed to implement the district court's *Coleman* decisions. See, *e.g.*, S. Rep. No. 230, 100th Cong., 1st Sess. 6 (1987) (the loan-restructuring provisions "are intended to carry out the intent of the *Coleman* decisions in the context of this reform of FmHA practices"); *id.* at 38 (the Credit Act's notice section is "based on careful analysis of the *Coleman* opinions and is designed to address, for the future, the notice issues raised in that case"). See also Pet. App. 9a, 14a.

[9] The prior law did not have the $18,000 cap but only allowed for releases prior to acceleration of the debt. See Pet. App. 47a.

deprived of due process when the legislature adjusts benefit levels" because "the legislative determination provides all the process that is due") (citations omitted).

Finally, the court of appeals correctly ruled that the Credit Act itself did not unconstitutionally apply retroactively to deprive farmers of income-release rights. Pet. App. 16a. This Court in *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984), made it clear that:

> the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Here, the court of appeals correctly ruled that the retroactive application of the Credit Act to the question of income release was justified by the need to allocate FmHA resources fairly, which "is definitely the kind of 'rational legislative purpose' which passes the constitutional test for retroactive legislation." Pet. App. 16a.[10]

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[10] Indeed, petitioners have not challenged that holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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